JURISDICTION

The judgment of the Court of Appeals for the D.C. Circuit was entered on July 15, 2005. A petition for rehearing was denied on October 19, 2005. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty or property, without due process of the law." U.S. Const., Art. XIV, § 1.

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides, in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

Rule 23(d)(2) of the Federal Rules of Civil Procedure provides, in relevant part: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action

Rule 6(b) of the Federal Rules of Civil Procedure provides, in relevant part: "When by these rules or by a notice given

thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

STATEMENT OF THE CASE

A. Introduction

Petitioners are 300 African American farmers who are members of a class certified by the United States District Court for the District of Columbia in 1998. *Pigford v. Glickman*, 182 F.R.D 341 (D.D.C. 1998). After a settlement was reached and a consent decree entered, petitioners filed claims in accordance with the procedures established by the consent decree. All 300 petitioners' claims were denied. Pursuant to the procedure specified in the Consent Decree and subsequent order of the court, petitioners sought re-examination of their claims by filing a petition with the claims monitor. Through no fault of their own, petitioners missed their respective deadlines for seeking re-examination and their claims were extinguished. The District Court, while acknowledging that petitioners were largely blameless, denied petitioners' motion for relief from the deadlines, a judgment that was affirmed by a divided panel of the Court of Appeals.

B. Statement of Facts

1. *Proceedings in the District Court*

In April 1999, a discrimination class-action[1] brought by African American farmers against the United States Depart-

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[1] The class was certified pursuant to Rule 23(b)(3). *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd* 208 F.3d 1212 (D.C.Cir. 2000).

ment of Agriculture ("USDA"), *Pigford v. Glickman*, was settled by a consent decree (the "Consent Decree"), hailed as "a grand historical first step toward righting the wrongs visited upon thousands of African American farmers." *Pigford v. Glickman*, 127 F.Supp 2d 35, 40 (D.D.C. 2001). The class alleged USDA discriminated against African Americans who applied for credit during the period 1981 through 1996, in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, *et seq*. The settlement was, and is still, the ~~"largest~~ civil rights settlement in history," *Pigford v. Glickman*, 185 F.R.D. 82, 112 (D.D.C. 1999), pursuant to which the claims of over 21,000 class members have been adjudicated and nearly one billion dollars awarded.

Notice of the settlement and proposed consent decree was widely disseminated by a variety of methods, including but not limited to direct mail, publication in newspapers and magazines, televised commercials, and radio broadcasts. *Pigford v. Glickman*, 185 F.R.D. 82, 91 (D.D.C. 1999), *aff'd* 208 F.3d 12[illegible]2 (D.C.Cir. 2000). This comprehensive notice program was designed to reach as many class members as possible, "some of whom are elderly or have difficulty reading and most of whom have little experience with the legal system." *Pigford v. Veneman*, 148 F.Supp.2d 31, 34 (D.D.C. 2001).

The process established by the Consent Decree to resolve the claims of individual class members permits class members to choose between two different claims procedures, known as Track A and Track B. Class members who elect to proceed under Track A fill out a simple claim form, to which USDA is allowed a response; the claim form and the USDA response are then forwarded to an adjudicator for a decision. Track A claimants need only prove their claims by "substantial evidence," a "fairly low burden of proof[,] but their recovery is limited to $50,000 and forgiveness of debt to [USDA]" where appropriate. *Pigford v. Glickman*, 185

F.R.D. 82, 96 (D.D.C. 1999). Class members who proceed under "Track B" must prove their claims by a preponderance of the evidence at a one-day mini trial before an arbitrator. *Id.* at 97. Recovery under Track B is unlimited. Track B awards have ranged from zero to over $1.4 million and the average award is over $500,000.

The claims procedure established by the Consent Decree includes a type of appellate review for any class member whose claim is denied, whether under Track A or B. App. at 103a, 113a-118a. Pursuant to the Decree, an unsuccessful class member[2] may petition the court-appointed monitor (the "Monitor") to review the denial of his claim and determine whether there has been a clear and manifest error in the process, resulting in a fundamental miscarriage of justice.

On April 4, 2000, the district court issued an "Order of Reference" (the "Order of Reference") "establish[ing] the procedure by which claimants could file Petitions for Monitor Review in accordance with . . . the Consent Decree." App. at 93a. The Order of Reference "encouraged [claimants] to seek the assistance of counsel in preparing their petitions for monitor review." Just below this statement, the address and telephone number for lead class counsel was provided. App. at 97a. All Track A decisions denying the claimant relief concluded with a paragraph that strongly encouraged the claimant to consult with an attorney and provided the name, address and telephone number of lead class counsel.

The Consent Decree, and the Order of Reference, omitted an important aspect of the Monitor-review process: the deadline for seeking Monitor review. To resolve this, and other outstanding issues, on July 14, 2000 the parties entered into, and the court approved, a stipulation establishing a 120-day deadline to be applied as follows: for class members with

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[2] Under the Consent Decree, the review process also is available to USDA when it is unsuccessful. App. 120.

adverse decisions prior to July 14, 2000, petitions for monitor review were due within 120 days from the date of the agreement (i.e. by November 14, 2000) and for class members who received adverse decisions after July 14, 2000 petitions for monitor review (hereinafter singularly "PMR" and in the plural "PMR's") were due within 120 days from the date of the decision denying the claim. App. at 90a-91a. Included within the July 14, 2000 stipulation and order (hereinafter ""S&O") was a notice provision requiring copies of the S&O to be posted in all USDA county offices and sent to all persons who had requested a claim form but not submitted a claim.[3] App. at 91a.

By October 2000, it became clear class counsel would not be able to meet the 120-day deadline for the thousands of Track A claimants with decisions before July 14, 2000. On October 31, 2000 class counsel filed a motion seeking additional time.

On November 8, 2000, the district court held a hearing on plaintiffs' motion and granted plaintiffs' request for additional time to file completed PMR's. Under the system devised by the district court, class counsel was required to file a Register of Petitions (the "Register") by November 13, 2000, listing all class members whose claims were denied prior to July 14, 2000 and who had requested assistance from class counsel in preparing a PMR; thereafter, class counsel would not be permitted to file a PMR for any claimant who received a decision on or before July 14, 2000 and who was not on the Register. App. at 85a-86a. Based upon the projection counsel would be handling approximately 2,500 requests for assistance with PMRs the district court established May 15, 2001 as the new deadline for all claimants on

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[3] The purpose of sending notice to the latter category of people was to put them on notice concerning the late-claim submission process—an issue that was also covered by the S&O.

the Register to submit a fully-supported PMR (or withdrawal). App. at 86a. On November 13, 2000 lead class counsel and one "of counsel" firm filed registers of petitions listing some 3,700 claimants who had sought their assistance in filing a PMR.

Following the establishment of the May 15, 2001 deadline, class counsel encountered severe financial and manpower problems that impacted their ability to meet the deadline. Class counsel brought these problems to the district court's attention 60 days before the May 15, 2001 deadline. On April 27, 2001 the district court temporarily suspended the May 15, 2001 filing deadline. *Pigford v. Veneman*, 144 F.Supp.2d 16 (D.D.C. 2001)[4]. On May 15, 2001 the district court entered an order establishing a new deadline of September 15, 2001 for class counsel to file all outstanding PMRs. *Pigford v. Veneman*, 143 F.Supp.2d 28 (D.D.C. 2001). Both the April 27, 2001 and the May 15, 2001 orders were harshly critical of class counsel's performance in the Track A PMR process. *See* 143 F.Supp.2d. 28, *supra*, and 144 F.Supp.2d 16, *supra*. The court assessed sanctions against class counsel for their failure to meet the Track A PMR deadlines, which ultimately amounted to $308,000. *Pigford v. Veneman*, 307 F.Supp.2d 51, 60 (D.D.C. 2004).

By September 15, 2001 PMR's were filed for all claimants on the Register. In the fourteen months between July 2000 and September 15, 2001, two small firms[5] processed over 4,000[6] requests for assistance with PMRs (including the filing of 3,100 fully supported PMR's), responded to over 550

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[4] The reported version of the order erroneously indicates it was issued on May 27, 2001.

[5] Conlon Frantz Phelan & Pires, lead counsel for the class and Chestnut Sanders, at that time, "of counsel" to the class.

[6] This figure includes over 3,700 claimants on the Register and another 461 not on the Register because their decisions were after July 14, 2000.

PMRs filed by USDA, brought several Track B cases successfully through the arbitration process and fulfilled all of the other responsibilities attendant to serving as class counsel.

On July 19, 2002 plaintiffs filed a motion seeking relief for 97 claimants whose PMRs were filed by September 15, 2001 but were considered late-filed for a variety of reasons. Plaintiffs also sought relief for 208 claimants who were not represented by class counsel in the PMR process and who had missed their operative deadlines established by S&O. Of these 208 claimants, 170 were *pro se* and 38 were represented by unaffiliated counsel.[7] Plaintiffs sought relief for these individuals on the grounds that many of these individuals and their counsel did not receive notice of the 120 day deadlines established by the S&O.

On June 2, 2003 the district court denied plaintiffs' motion. As to the 97 claimants represented by class counsel, the court rejected plaintiffs' argument that the unexpectedly high volume of PMRs was a changed circumstance sufficient to justify relief under Rule 60(b)(5). App. at 54a-56a. The court held that the "exponential increase in claimants" was known to plaintiffs when they entered into the S&O and did not constitute a change in circumstances. *Id.* As to the 208 other claimants, the court held that lack of notice of the deadlines applicable to their PMRs was an insufficient basis for providing relief to them in view of the prejudice the government might suffer by their inclusion. App. at 56a-58a. On June 16, 2003 plaintiffs moved for reconsideration; on March 10, 2004 the district court denied plaintiffs' motion for essentially the same reasons it cited previously. App. at 36a.

It has been over four years since the September 15, 2001 deadline. Over 1,000 of the PMRs filed by class counsel remain undecided, sitting in boxes awaiting review by the

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[7] The term "unaffiliated counsel" refers to counsel not affiliated with class counsel.

Monitor. In addition, new class members are allowed into the case every month and since September 15, 2001 over 2,000 class members have been allowed to late-file new claims for relief under the Consent Decree. The Monitor's term was recently extended from April 2005 to March 2007.

2. *The Court of Appeals' Decision Granting Rule 60(b)(5) Relief in* Pigford v. Veneman, *("Pigford I")*

Three years prior to denying relief to petitioners here, the D.C. Circuit heard the case of *Pigford* class member Earl Kitchen. *Pigford v. Veneman*, 292 F.3d 918 (D.C.Cir. 2002) (at times, "*Pigford I*"). App. at 66a. Mr. Kitchen, a Track B claimant, sought relief, pursuant to Rule 60(b)(5), from certain deadlines contained in the Consent Decree that Mr. Kitchen's attorney had failed to meet. In the absence of such relief, Mr. Kitchen's claim would have been extinguished. App. at 71a, 81a. The Court of Appeals, interpreting this Court's decision in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), held that Mr. Kitchen was entitled to relief from the deadlines under Rule 60(b)(5) because, under the circumstances of this case, he should not be held accountable for the errors of class counsel in missing the deadlines.

In granting relief to this one class member, the Court of Appeals distinguished this Court's decisions in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) and *Pioneer Inv. Servs. Co v. Brunswick Assocs.*, 507 U.S. 380 (1993), because in this case, i.e. in the *Pigford* class action, "except for the three named plaintiffs, not one of the thousands of class members 'voluntarily chose' class counsel. Quite the contrary, by certifying the class, the district court effectively appointed counsel for the farmers." App. at 79a. Accordingly, the Court found that the presumption of client ac-

countability for attorney conduct, recognized by this Court in *Link*, was overcome. App. at 78a-79a.

In response to the USDA's argument that the Consent Decree allowed farmers to select any lawyer—not just class counsel—to pursue their claims, the D.C. Circuit found that the "circumstances of this case, together with the terms of the decree itself, make such choices unlikely." The three "circumstances" cited by the panel were: 1) under the decree lawyers cannot charge class members for their work; 2) class counsel received an advance fee award; 3) class counsel benefited from the district court's "seal of approval." App. at 79a.

Citing extensively from the District Court's orders of May and April 2001, which dealt only with the performance of class counsel in the Track A process, the D.C. Circuit found that the farmers lacked competent counsel—an implied condition of the Consent Decree and a necessary part of the adjudication process established by the Decree. App. at 77a-78a. "Unless the farmers have competent counsel, we cannot imagine how they could ever obtain 'full and fair' treatment in a claims process where (as in Kitchen's case) missing a single deadline could be fatal." App. at 80a. Accordingly, the panel held that class counsel's "failure to meet critical Track B deadlines amounts to an 'unforeseen obstacle' that makes the decree 'unworkable,'" entitling Mr. Kitchen to relief under Rule 60(b)(5). App. at 81a (*quoting Rufo*, 502 U.S. at 384).

3. *The Court of Appeals' Decision Denying Rule 60(b)(5) Relief For Petitioners*

On July 15, 2005 a divided panel of D.C. Circuit issued a decision affirming the district court's denial of relief from the PMR deadlines. Writing for the majority, Judge Henderson held that the district court did not abuse its discretion in denying plaintiffs' motions for relief and reconsideration.

With regard to the 92[8] class members represented by class counsel, the majority held that the district court did not err in refusing to find changed circumstances sufficient to justify relief under Rule 60(b)(5), irrespective of the decision of the *Pigford I* panel allowing such relief. *Pigford I*, the panel concluded, "presented a different situation in two respects." App. at 17a. at First, *Pigford I* was "different" because "[i]n *Pigford I* the court modified the consent order to permit arbitrators to extend the deadlines . . . in Track B litigation . . . based upon class counsel's 'malpractice' in the Track B litigation, namely, 'its (sic) inability to represent all Track B claimants adequately.'" App. at 17a, quoting *Pigford I*, 292 F.3d at 925 (citations omitted).

Second, the majority distinguished *Pigford I* on the grounds that "it came to us in a different posture." App. at 18a. The difference in "posture" between *Pigford I* and this case, the panel reasoned, is that in this case the Court was called upon to "review the district court's decision *not* to grant relief and 'may overturn such an order only for an abuse of discretion.'" *Id.*, (emphasis in original), *quoting Summers v. Howard Univ.*, 374 F.27d 1188, 1992 (D.C.Cir. 2004). "Although the district court might have been warranted in modifying the deadlines based upon class counsel's failure to meet the deadlines," the panel stated, "the court did not abuse its discretion in declining to do so." App. at 18a.

Concerning claimants who late-filed PMR's *pro se* or through unaffiliated counsel, the majority deemed it irrelevant those claimants may not have received notice of the deadlines applicable to their PMR's and found no error in the district court's refusal to afford them relief. App. at 20a. According to the panel, "If the district court had granted the requested relief from the deadlines, the government would have lost the benefit of its bargain—certainty and finality as to its maxi-

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[8] Five class members who were before the district court did not participate in the appellate proceedings.

mum liability as of the agreed upon date—while the claimant class would have recovered the bargained-away right to compensation for claimants filing review petitions beyond the stipulated deadlines (as extended by the court)." App. at 20a (footnote omitted).

Judge Rogers dissented finding that the district court abused its discretion by failing to consider relevant facts that demonstrated "changed circumstances" sufficient to justify application of Rule 60(b)(5), failing to apply the legal standard set by the Court in *Pigford I*, and failing to inquire into whether notice of the PMR deadline was adequate to reach the 208 class members who sought relief based upon lack of notice. App. at 34a-35a.

Judge Rogers cited to statistical record evidence that "substantiated class counsel's argument that many meritorious claims had been erroneously denied by the adjudicator, necessitating the filing of petitions for monitor review and creating more work for class counsel than was anticipated when the July 14th Order deadlines were agreed to." App. at 25a. The contrary conclusion reached by the district court, she argued, "ignored the key distinction argued by appellants . . . and supported by evidence," that the critical change in circumstances was not the increased number of *total* claimants but rather the unexpectedly high number of claimants who met the stringent standard for seeking Monitor review. App. at 24a.

The district court's failure to follow the law as laid down by the D.C. Circuit in *Pigford I* was cited by the dissent as an alternative reason for reversal. Judge Rogers criticized the district court and the majority for "ignor[ing] our anaylsis in *Pigford I*," which she characterized as "nearly akin to the law of the case, in addition to being law of the circuit." App. at 30a. In a vigorous rejection of the majority's effort to distinguish *Pigford I*, she stated:

> That *Pigford I* involved claims under Track B rather than Track A does not change the fact that the legal issue

> before the court is the same: whether appellants are entitled to relief under Rule 60(b)(5) for counsel's failures to meet filing deadlines. . . This court cannot avoid, by pointing to 'a different procedural posture,' that the district court is bound, under *Pigford I* . . . to separate class counsel's failings from the claims of class members . . . and that the district court's failure to do so is an abuse of discretion.

App. at 31a (citations omitted).

On the issue of the 208 class members who may not have received the court-approved notice of the PMR deadlines, Judge Rogers found that the district court erred "by failing to inquire whether the 208 claimants' late filing were due to the inadequacy of the notice procedures before determining whether to deny any relief." App. at 22a.

On October 19, 2005, the panel denied the petition for rehearing. App. at 3a. Judge Rogers would have granted the petition. On October 19, 2005 the petition for rehearing en banc was also denied. App. at 1a.

REASONS FOR GRANTING THE PETITION

This case presents two extraordinarily important issues concerning the conduct of class actions in federal courts.

First, by dispensing with the question of whether 208 eligible class members received adequate notice of the filing deadlines applicable to their claims, the D.C. Circuit makes a sharp break with years of Rule 23 jurisprudence that has insisted on protection for the rights of absent class members. In denying relief to these class members who missed a dispositive deadline, 170 of whom were *pro se*, the district court refused to inquire into whether the notice of those deadlines was adequate to apprise those class members of their rights. The district court took this position despite a finding by the claims monitor that the notice was "probably inadequate." The D.C. Circuit found no fault with this approach and engaged in no analysis at all of the notice issue.

On the contrary, the D.C. Circuit's analysis of the rights of these class members focused almost exclusively on the prejudice to the government if the late claims were to be allowed. The Circuit Court, like the district court, bypassed the notice issue entirely.

It was the district court's duty to ensure that adequate notice procedures were established to provide class members with notice of filing deadlines. By not requiring the district court to discharge that duty, the D.C. Circuit allowed 208 claims to be extinguished without determining whether the claimants received due process. This decision raises important procedural and constitutional issues concerning the rights of absent class members and the duties of Rule 23 courts.

Next, by refusing to afford relief to class counsels' 92 clients whose PMR deadlines counsel failed to meet, the D.C. Circuit has created incomprehensible precedent under both Rule 23 and Rule 60(b)(5). In *Pigford I*, the D.C. Circuit carved out an exception to the presumption of client accountability for attorney conduct. *Pigford I* held that in class actions where class members have no meaningful choice in selecting attorneys to represent them in the claims process that presumption is overcome. Accordingly, in such cases, the court held, Rule 60(b)(5) relief may be appropriate to relieve the class member of the effects of his attorney's conduct. The court in *Pigford I*, while carving a narrow exception, gave no indication that the case was *sui generis*.

Three years later the D.C. Circuit refused to apply the *Pigford I* holding in *the same case, under the same circumstances*. These conflicting decisions of the D.C. Circuit, besides treating similarly situated class members differently, have thrown into question the nature of the relationship between the class and class counsel. It is impossible to discern from these two decisions any standard by which a court, a class member or class counsel could determine when class members will be bound by class counsel's errors and

when they will not. Similarly, the court's contrary decisions have obfuscated the standard for granting Rule 60(b)(5) relief consistent with *Rufo*: a side-by-side analysis of the two decisions yields no legally viable explanation for the granting of relief in one and the denial in the other.

I. THE DECISION IGNORES THE RIGHT OF ABSENT CLASS MEMBER TO RECEIVE CONSTITUTIONALLY ADEQUATE NOTICE OF THE PROCEEDINGS BEFORE BEING BOUND BY THE OUTCOME

The district court and the circuit court rejected the argument that 208 claimants in this case, 170 *pro se* and 38 represented by unaffiliated counsel, should be excused from the PMR deadlines because they did not receive notice of those deadlines. Both courts failed to address the issue at the heart of this argument: whether the notice procedure was adequate to advise these class members of a material change to the claim process and the possible loss of substantive rights conferred upon them by the Consent Decree, i.e. the right to Monitor review.

The paramount duty of the district court presiding over a class action is to protect absent class members by, *inter alia*, ensuring adequate notice to them of the proceedings. "[B]efore an absent class member's right of action [is] extinguishable due process require[s] that the member 'receive notice plus an opportunity to be heard and participate in the litigation.'" *Zients v. Lamorte*, 459 F.2d 628, 630-631 (2nd Cir. 1972), *quoting Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). To comport with due process, the notice must be "the best practicable" under the circumstances. *Shutts, supra*, 472 U.S. at 812. *See also Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 176 (1974); F.R.Civ.P. 23(c).

The court's obligation to absentees does not terminate with the giving of mandatory notice under Rule 23(c). Rule

23(d)(2) allows the court in its discretion to issue notices to some or all of the class members to advise them of any step in the action. F.R.Civ.P 23(d)(2). "The protection of absentees is one of the basic objectives of Rule 23(d)." 7B Wright & Miller, Federal Practice and Procedure §1791. *See also* F.R.Civ.P. 23 Advisory Committee Notes to 1966 Amendment ("mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process"). When the district court uses its powers under Rule 23(d)(2) to send notice pertaining to the claims procedure, "the sufficiency of [that notice] is measured against the . . . standards of due process." *In Re Gypsum Antitrust Cases*, 565 F.2d 11231126-1127 (9th Cir. 1977).

When a class member does not receive actual notice of a deadline by which they must take some action to preserve their claims, the district court may "exercise its equitable authority to excuse the late filings." *In Re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315, 320 (3rd Cir. 2001). *See also Zients v. Lamorte*, 459 F.2d 628, 630-631 (2nd Cir. 1972). A "district court overseeing settlement distribution has inherent power to accept late claims despite contrary terms of agreement." *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 145 (2d Cir.1987). The inherent equitable authority of a court overseeing a class action is not the exclusive source of its power. The court also retains the power to excuse late-filings under Rule 6(b), Rule 23(d) and Rule 60(b). *See e.g. In Re Prudential Ins. Co. of America*, 177 F.R.D. 216, 235 (D.N.J. 1997).

The adequacy of notice to class members determines its binding effect; therefore, before decide whether a claim of lack of notice can form the basis for relief under Rule 6(b), Rule 23(d) or Rule 60(b) the court must determine as a threshold matter whether notice was legally adequate.

In this case, a comprehensive class notice program was developed to notify absent class members about the existence of the action and the (proposed) Consent Decree. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd* 208 F.3d 1212 (D.C.Cir. 2000). The Consent Decree did not include a deadline for filing a petition for monitor review and class members receiving the notice would have no reason to believe that the monitor review process included a deadline. Subsequently, approximately a year and a half after the original class-wide notice went out, a deadline was established by the July 14, 2000 Stipulation and Order. Notably, the notice procedures used to advise class members about this new deadline were far less comprehensive than the original notice program and did not include individual notice by mail to all farmers who had lost on the merits and had the right to seek Monitor review. App. at 91a.

When confronted with: 1) evidence that some 200 class members did not receive the notice of deadlines by which their claims would be finally extinguished if not appealed and 2) a finding by the Monitor that the notice was not adequate to reach farmers to whom it applied, the court had a duty to inquire whether, in fact, the notice of the new deadline was adequate to satisfy the requirements of due process. Only then could the court determine whether these claimants were entitled to relief under either Rule 60(b) or Rule 6(b). Instead, the court assumed the adequacy of the notice and analyzed the issue from there.

The decision of the Court of Appeals disregards the due process rights of these vulnerable class members. By refusing to examine the issue of notice before denying relief to petitioners, the Court of Appeals applied an improper standard that ignored a threshold constitutional issue and allowed an injustice to stand. Only this Court has the power to remedy that injustice.

II. THE DECISION DIRECTLY CONFLICTS WITH THE CIRCUIT'S OWN RECENT PRECEDENT, CREATING CONFUSION ON IMPORTANT LEGAL ISSUES CONCERNING THE RIGHTS OF CLASS MEMBERS, THE ROLE OF CLASS COUNSEL AND THE OPERATION OF RULE 60(b)(5)

It is impossible to reconcile the D.C. Circuit's decision in *Pigford I* with its decision here. In view of the important issues that these two decisions addressed, including *Pigford I*'s novel interpretation of this Court's precedent, this state of conflict should be resolved. Given the importance and prevalence of class actions in the federal system, the confusion created by these two conflicting decisions threatens to undermine the orderly administration of justice upon which such actions rely. Moreover, the D.C. Circuit's refusal to apply its own precedent—decided in the same case and under the circumstances—to this matter is a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

A. The Holding of *Pigford I* Was Clear and Was Not by Its Terms or Reasoning Limited to That One Class Member

The D.C. Circuit in *Pigford I* held that class counsels' failure to meet critical deadlines was a significant unforeseen obstacle that made the Consent Decree "unworkable" and subject to modification. App. at 80a. In arriving at its decision, the the *Pigford I* panel interpreted this Court's holding in *Link v. Wabash*, 370 U.S. 626 (1962) and held the presumption that clients are bound by the acts of their attorneys was "rebuttable" and more easily overcome in class actions than other types of litigation. App. at 79a. The court held that under the circumstances of this class action, the presumption was rebutted and that "other than the three named plaintiffs

not one of the thousands of class members 'voluntarily chose' class counsel." App. at 78a (emphasis added).

The circumstances cited by the *Pigford* I court as sufficient to rebut *Link's* presumption of client accountability for attorney conduct were not unusual or unique to the *Pigford* case. The court cited three circumstances: 1) class counsel benefited from the district court's "seal of approval (something which occurs in every class action); 2) under the decree attorneys may not charge claimants but rather must seek fees under the fee provision of ECOA; 3) class counsel received a fee advance. App. at 78a-79a. Each of these circumstances is common in public interest class action litigation. Moreover, the court made no special effort to limit its holding to the case of Earl Kitchen or otherwise. The court did not, for example, caution against too broad a reading of its holding or warn that its application was limited.

In short, there is nothing in *Pigford I* that limits the court's holding to that one class member or even to this one case. The pronouncements of the D.C. Circuit have wide applicability, particularly its interpretation of *Link* as applied to class actions.[9]

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[9] The holding of *Pigford I* has implications for both class action litigation and Rule 60(b) litigation and is no minor matter. No other federal appeals court has ever suggested that class members may not be bound by the actions of class counsel. Similarly, no consent decree has ever been modified due to class counsel's conduct. Despite its relatively short life, *Pigford I* has already been cited a number of times, including citations in Wright and Miller and AmJur. *See e.g.* 11 Wright & Miller, Federal Practice and Procedure Civ. 2d, §2863.

B. The Decision Below Failed to Distinguish *Pigford I* And Provided No Reasonable Explanation For The Refusal to Follow That Binding Precedent

In rendering the decision below, the D.C. Circuit sought to distinguish *Pigford I* on two grounds: 1) *Pigford I* involved a Track B claimant, while this case involves Track A claimants, and 2) *Pigford I* involved "class counsel's 'malpractice' in the Track B litigation, namely, 'its inability to represent all Track B claimants adequately.'" App. at 17a. But the rule of law laid down in *Pigford I* was not based upon the claimant's Track B status, nor was its assessment of class counsel's performance limited to, or even focused on, Track B claims. The Track B status of Mr. Kitchens was barely mentioned. Nearly all of the case history recounted by the court in *Pigford I* describes class counsel's failings in the Track A petition for monitor review process—the very matter at issue below.[10] Contrary to the majority's characterization of *Pigford I*, that decision was not limited, either by its express language or by implication, to Track B claims, nor was its focus the conduct of counsel in the Track B process.

Pigford I and this matter involved the same class action "the *same* unique history, the *same* consent decree, and the *same* issue of modification of deadlines missed by class counsel under Rule 60(b)(5) considered in the *same* court." App. at 30a (emphasis in original). The holding of *Pigford I* that "in this case, except for the three named plaintiffs *not one of the thousands of class members* 'voluntarily chose' class counsel," was a material part of that court's decision and

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[10] In describing the facts it deemed pertinent to its decision, the *Pigford I* panel quoted extensively from the district court's decisions of April 27, 2001 and May 15, 2001, both of which dealt *exclusively* with the issue of the Track A PMR process. Not one district court quote used by the *Pigford I* panel actually pertained to class counsel's performance in the Track B litigation.

became binding precedent on subsequent courts, including the court below. *See In re Tuttle*, 291 F.3d 1238, 1242 -1243 (10th Cir. 2002) (where court's statement was "essential to its decision," it is binding on future panels). The D.C. Circuit faced the exact same legal issue below as it did in *Pigford I*: whether petitioners, who did not 'voluntarily chose' class counsel[11] were entitled to relief under Rule 60(b)(5) for counsel's failure to meet filing deadline. That the court below decided the issue differently than it did in *Pigford I* can only be described as an arbitrary application of legal principles.

C. By Reaching a Result Directly at Odds With Its Own Precedent, The Circuit Court Has Confused Significant Legal Issues and Undermined the Rule of Law

"Inconsistency is the antithesis of the rule of law. For judges, the most basic principle of jurisprudence is that 'we must act alike in all cases of like nature.'" *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C.Cir. 1996). To allow the decisions of the panel in *Pigford I* and in the court below to co-exist is to violate that principle. With the ever-increasing use of class actions, and consent decrees to resolve those class actions, the D.C. Circuit has created inconsistency where it is likely to do great harm. Class actions and the consent decrees that often resolve them raise complex and thorny legal issues. With its two conflicting *Pigford* decisions the D.C. Circuit Court has further complicated the landscape in that area of the law by attempting to parse a distinction so fine it cannot be understood by reference to any legal standard.

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[11] In fact, petitioners had even less of a meaningful choice of counsel than the appellant in *Pigford I*. Petitioners were repeatedly advised by the district court to seek the assistance of class counsel. See p. 5, *supra*. Moreover, having already lost once, petitioners were unlikely to find outside counsel willing to file their PMRs.

CONCLUSION

For all the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Oct 19, 2005]

No. 04-5171
97cv01978
98cv01693

TIMOTHY C. PIGFORD, *et al.*,
Appellants,

v.

MICHAEL JOHANNS, Secretary,
The United States Department of Agriculture,
Appellee.

Consolidated with 04-5172

BEFORE: GINSBURG, *Chief Judge*, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND,* BROWN AND GRIFFITH, *Circuit Judges.*

ORDER

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judge Garland did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Oct 19, 2005]

No. 04-5171
97cv01978
98cv01693

TIMOTHY C. PIGFORD, *et al.*,
Appellants,

v.

MICHAEL JOHANNS, Secretary,
The United States Department of Agriculture,
Appellee.

Consolidated with 04-5172

BEFORE: SENTELLE, HENDERSON, and ROGERS,* *Circuit Judges*.

ORDER

Upon consideration of appellants' petition for rehearing filed August 29, 2005, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

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* Circuit Judge Rogers would grant the petition for rehearing.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 15, 2005]

No. 04-5171

TIMOTHY C. PIGFORD, *et al.*,
Appellants,

v.

MIKE JOHANNS, Secretary,
The United States Department of Agriculture,
Appellee.

Consolidated with 04-5172

Appeals from the United States District Court
(USDC) for the District of Columbia
(No. 97cv01978)
(No. 98cv01693)

Before: SENTELLE, HENDERSON and ROGERS, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

Date: July 15, 2005

Opinion for the court filed by Circuit Judge Henderson.
Opinion concurring in part and dissenting in part filed by Circuit Judge Rogers.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 14, 2005 Decided July 15, 2005

No. 04-5171

TIMOTHY C. PIGFORD *et al.*,
Appellants,

v.

MIKE JOHANNS, SECRETARY, THE UNITED STATES DEPARTMENT OF AGRICULTURE,
Appellee.

No. 04-5172

CECIL BREWINGTON et al.,
Appellants,

v.

MIKE JOHANNS, SECRETARY, THE UNITED STATES DEPARTMENT OF AGRICULTURE,
Appellee.

Appeals from the United States District Court
for the District of Columbia
(No. 97cv01978)
(No. 98cv01693)

Alexander J. Pires, Jr. argued the cause for the appellants.

Howard S. Scher, Attorney, United States Department of Justice, argued the cause for the appellee. *Peter D. Keisler*, Assistant Attorney General, United States Department of

Justice, *Kenneth L. Wainstein*, United States Attorney, and *Robert M. Loeb*, Attorney, United States Department of Justice, were on brief.

Before: SENTELLE, HENDERSON and ROGERS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Separate opinion concurring in part and dissenting in part filed by *Circuit Judge* ROGERS.

KAREN LECRAFT HENDERSON, *Circuit Judge:* This appeal arises from a longstanding discrimination action by black farmers against the United States Department of Agriculture (Department) alleging racial discrimination in the administration of federally-funded credit and benefit programs. The appellants are farmers whose discrimination claims were denied in adjudications conducted pursuant to a Consent Decree and whose petitions for review of the adverse adjudications were rejected as untimely because they were filed after the stipulated deadlines that the parties negotiated and the court approved in a Stipulation and Order (S&O). The appellants challenge the district court's denial of their motions for relief from the stipulated deadlines under Fed. R. Civ. P. 60(b)(5) and the court's inherent equitable authority. Because the court did not abuse its discretion in denying the motions, we affirm its judgment.

I.

In 1997 a class of black farmers filed this action in the district court alleging racial discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*[1] On

[1] The complaint also alleged violation of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, but, according to the district court, "both sides agree that this case essentially is brought under the Equal Credit Opportunity Act." *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.D.C. 1999), *affirmed*, 206 F.3d 1212 (D.C. Cir. 2001).

April 14, 1999 the district court entered the Consent Decree which established a two-track system for resolving the individual class members' claims. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *affirmed*, 206 F.3d 1212 (D.C. Cir. 2001). Under Track A, a class member with little or no documentary evidence could submit his claim to an adjudicator and obtain payment of $50,000 and forgiveness of debt owed the Department if he proved discrimination by substantial evidence. Such a claimant "has a fairly low burden of proof but his recovery is limited." *Id.* at 96. Track B, by contrast, set no dollar cap on a claimant's recovery but the claimant must prove discrimination by a preponderance of the evidence, "a higher burden of proof." *Id.* A claimant in either track could file a petition for review of an adverse decision by the adjudicator with an independent monitor who "shall direct the adjudicator to reexamine the claim if he determines that 'a clear and manifest error has occurred' that is 'likely to result in a fundamental miscarriage of justice.'" *Id.* at 97 (quoting Consent Decree ¶ 12(b)(iii), at 21.

Because the Consent Decree provided no timetable for seeking review by the monitor, the parties negotiated filing deadlines which are set out in the S&O entered by the district court on July 14, 2000. Under the S&O any claimant who had received an adverse adjudicator decision as of the date of the S&O had 120 days from that date (i.e., by November 13, 2000) to file a petition with the monitor. Any claimant who received an adverse decision after the S&O's date had 120 days from the date of the adjudication to file a petition. The S&O expressly recites: "No extensions of these deadlines will be granted for any reason." *Id.*

On October 31, 2000 the claimants' class counsel filed a motion seeking to "redesign" the "unworkable" petition filing process, noting that as of that date counsel had filed petitions on behalf of only 297 of the 3,873 claimants requesting filing assistance. Pls.' Mot. for Expedited Hearing at 7, 3-4 (filed

Oct. 31, 2000). Following a conference with the parties the district court issued an order on November 8, 2000 directing that, in lieu of a completed petition for each of the claimants, counsel could satisfy the November 13, 2000 deadline by submitting a "Register of Petitions" (Register) which simply listed the name and claim number of each claimant who had sought counsel's assistance in filing a petition for review of an adverse decision issued as of the S&O date. *Pigford v. Glickman*, C.A. Nos. 97- 1978, 98-1693 (D.D.C. filed Nov. 8, 2000), 2000 WL 34292618. The court explained that, while "counsel should be held to the commitments to which they agreed," nonetheless "counsel's failings should not be visited on their clients." *Id.* at 3, 4, 2000 WL 34292618, at *1. The court further directed that class counsel file 400 of the Register's petitions by December 15, 2000 and another 400 by the 15th of each month thereafter up to a final filing date of May 15, 2001. The order recited: "Under no circumstances shall the Monitor accept supporting materials or withdrawals after May 15, 2001." *Id.* at 5, 2000 WL 34292618, at *3. In effect, the court doubled the stipulated time to file a petition for review of an adjudication decided as of the date of the S&O.

On March 15, 2001 the appellants filed a motion for an order suspending the May 15, 2001 deadline. The district court held a status conference and on April 27, 2001 issued an order directing "that all deadlines set forth in the Court's Order of November 8, 2000, are suspended until further order of the Court" pending a scheduled meeting on May 1, 2001 between class counsel and outside lawyers "who might be able to assemble a team of *pro bono* lawyers to assist class counsel on an emergency basis." *Pigford v. Veneman*, 144 F. Supp. 2d 16, 20 (D.D.C. 2001). In addition, the court ordered that if, after the May 1 meeting, class counsel decided additional time was necessary they should file a motion for extension no later than May 4, 2001 setting out a "realistic" filing schedule.

After the *pro bono* meeting the appellants proposed extending the filing deadline to September 15, 2001 and the district court so ordered on May 15, 2001, finding the new deadline "both realistic and reasonable" in light of the "impressive commitment made by *pro bono* counsel to assist Class Counsel." *Pigford v. Veneman*, 143 F. Supp. 2d 28, 30 (D.D.C. 2001). The May 15, 2001 order warned that "[u]nder no circumstances . . . shall the Monitor accept supporting materials or withdrawals that are filed after September 15, 2001." *Id.* at 31. Class counsel, with *pro bono* assistance, succeeded in filing all of the remaining petitions by the new deadline.

On July 19, 2002 class counsel filed a motion seeking relief under Fed. R. Civ. P. 60(b)(5) or the court's inherent equitable authority on behalf of 387 claimants whose review petitions had been rejected as untimely. On June 2, 2003 the district court denied the motion, concluding there were no changed circumstances that justified modifying the S&O deadlines (as amended). *Pigford v. Veneman*, 265 F. Supp. 2d 41 (D.D.C. 2003). The claimants moved for reconsideration, which the district court denied on March 10, 2004. *Pigford v. Veneman*, 307 F. Supp. 2d 43 (D.D.C. 2004). This appeal followed.

II.

The appellants comprise two groups of late-filing claimants: (1) those represented by class counsel, now numbering 92, and some 208 others who either proceeded *pro se* or were represented by lawyers unaffiliated with class counsel. Class counsel argues on behalf of each group that the district court erred in denying relief from the filing deadlines under either Rule 60(b)(5) or its inherent equitable power. We review the district court's decision whether to modify a consent order, either under Fed. R. Civ. P. 60(b)(5) or pursuant to its inherent authority, for abuse of discretion. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992) (Rule 60(b));

Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1475 (D.C. Cir. 1995) (inherent authority). We conclude the district court did not abuse its discretion in denying the appellants' motion for relief.

A. Class Counsel Petitions

The district court denied the appellants' motion for relief as to the 92 petitions filed late by class counsel because the appellants failed to demonstrate "changed circumstances" to warrant modifying the S&O schedule under Rule 60(b)(5), which provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application . . . ." The appellants challenge the court's Rule 60(b)(5) decision on two grounds. We address each in turn.

First, the appellants assert the district court incorrectly invoked Rule 60(b)(5) because the rule governs only orders that are final.[2] The appellants contend that the S&O was not a final order and that therefore the court should have decided whether to grant relief solely under its inherent equitable authority. *See Envtl. Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1240 (D.C. Cir. 1980) ("The power of a District Court sitting as a court of equity to modify the terms of a settlement

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[2] Initially the appellants moved to modify the S&O under Rule 60(b)(5). It was not until their motion for reconsideration that they first suggested the S&O was not final and therefore not subject to Rule 60(b). Hedging their bets on appeal, they invoke the court's jurisdiction either under 28 U.S.C. § 1291, which establishes this court's "jurisdiction of appeals from all final decisions of the district courts of the United States," or under 28 U.S.C. § 1292(a)(1), which allows appeals of "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." *See* Appellants' Br. at 1.

agreement it previously adopted cannot be drawn into question."). As a practical matter, it makes little difference whether the district court resolved the motion under Rule 60 or under its equitable authority as the standard for each is substantially the same. *Compare Rufo v. Inmates of Suffolk County Jail*, 502 U. S. 367, 393 (1992) (under Rule 60(b)(5), "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance"), *with Envtl. Defense Fund, Inc*, 636 F. 2d at 1240 ("[S]ound exercise of judicial discretion may require that terms of a consent decree be modified when there has been a significant change in the circumstances obtaining at the time the consent decree was entered."). Nonetheless, we conclude that the court correctly invoked Rule 60(b)(5).

The appellants do not dispute that the Consent Decree itself is final within the meaning of Rule 60(b)(5). *See* Appellants' Br. at 19. They contend, however, that because the S&O simply "establish[es] procedures for enforcing or implementing the decree," the S&O is "not considered 'final' within the meaning of Rule 60." *Id.* (citing *United States v. W. Elec. Co.*, 777 F.2d 23 (D.C. Cir. 1985); *Bogard v. Right*, 159 F.3d 1060 (7th Cir. 1998)). The authorities the appellants cite do not support their position. In *Western Elec.* this court reviewed the district court's denial of a request for waiver from restrictions in a consent decree based on the district court's decision not to consider the merits of such a waiver request until a later time when "'there is substantial competition in local telecommunications service.'" 777 F.2d at 25 (quoting *United States v. W. Elec. Co.*, 592 F. Supp. 846, 868 (D.D.C. 1984)). We explained that the district court's order denying the request was not "final" "because the district court contemplated further proceedings before ruling on the requests." *Id.* at 26. Similarly in *Bogard*, the Seventh Circuit concluded that an order that extended the term of a monitor

initially appointed for a three-year term "unless extended by order of this court" was not a final order because it had "no termination date" and therefore "[t]he postjudgment proceeding could drag on for many years and involve a host of far-reaching orders the consequences of which could not be undone when (if ever) the postjudgment proceeding ended with a showing of compliance so complete that the monitor's services could be dispensed with." 159 F.3d at 1062-63. By contrast, the district court's S&O fixed *final* deadlines for filing petitions with the monitor. *See* S&O ¶ 5, at 4 ("No extensions of these deadlines will be granted for any reason."). As with the Consent Decree, which the S&O supplemented, no further court action was contemplated at the time the S&O issued. That the S&O was in fact subsequently modified by the court in response to the appellants' requests does not make it any less final. Such modification of a final order is precisely what Rule 60(b) contemplates.[3]

Next, the appellants contend that even if the S&O is a final order subject to Rule 60(b), the district court abused its discretion in failing to modify the S&O for changed circumstances. Again we disagree.

In the June 2, 2003 order denying the appellants' motion for relief, the district court rejected their contention that "the large volume of claimants requesting assistance with petitions during a short period of time" constituted a changed circumstance because it "occurred *before*, not after, the relevant deadlines were agreed to by the parties and endorsed by the

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[3] Because the S&O is a final order subject to Rule 60(b), the district court's order denying relief is likewise final so that we have appellate jurisdiction under 28 U.S.C. § 1291 rather than under 28 U.S.C. § 1292(a)(1), *see supra* note 2. *See Lasky v. Cont'l Prods. Corp.* 804 F.2d 250, 253 (3d Cir. 1986) ("'[I]t is now well established that orders denying a motion for relief from a judgment under Civil Rule 60 are final.'" (quoting 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3916, at 610-11 (1976)).

Court." 265 F. Supp. 2d at 46 (emphasis by court). The court explained: "The exponential increase in claimants was fully apparent when plaintiffs and defendant negotiated and agreed to the July 14, 2000 Stipulation and Order, including its clear provision that 'no extensions of these deadlines will be granted for any reason.'" *Id.* at 46 (quoting (S&O ¶ 5, at 4)). The appellants do not quibble with the court's analysis, *see* Appellants' Br. at 22, but contend the court abused its discretion by failing to grant relief based on four other changed circumstances: (1) the unusually high number of claimants with meritorious grounds for review of their claim denials (caused by an unusually high rate of errors by the adjudicators); (2) the extreme work load borne by the two small class counsel firms because outside "of counsels" participated only "minimally" in the review petition filing (particularly after the court's March 8, 2001 ruling that attorney's fees for monitor review work not be available until after readjudication of reviewed claims produced a "disincentive to work on the monitor review process," Appellants' Br. at 24); (3) the exhaustion of class counsel's funds and credit by March 2, 2001; and (4) the "extra step" created by the Register provision. It is no surprise that the district court did not address these four changed circumstances in its initial decision as the appellants raised them for the first time in their motion for reconsideration. *Compare* Pls.' Mem. in Supp. of Mot. for Relief at 32-34 (filed July 19, 2002) *and* Pls.' Reply to Def.'s Opp'n to Mot. for Relief at 4-7 (filed Nov. 6, 2002) *with* Pls.' Mot. for Recons. at 9-16 (filed June 16, 2003). When the court addressed these newly raised circumstances in the reconsideration order, its response was admittedly brief: "The Court is well aware of the circumstances surrounding these petitions and further elaboration does not change this Court's opinion that plaintiffs have not demonstrated changed circumstances sufficient to justify

modification of the Court's Orders under Rule 60(b)(5)." 307 F. Supp. 2d at 48. The court's brevity, however, is understandable given what had come before.

To the extent the four new circumstances adversely affected the petition filing process, the court had already taken them into account and provided the appellants with relief. In response to class counsel's October 31, 2000 plea of an unexpectedly high volume of meritorious review petitions, the court modified the S&O on November 8 to permit class counsel to satisfy the November 13, 2000 filing deadline through the simple Register listing, a remedy the appellants accepted without complaint.[4] When class counsel sought relief in spring 2001 because of their depleted resources, both financial and human,[5] the court granted a four-month extension until September 15, 2001, by which deadline all of the remaining petitions were filed. Given the district court's repeated accommodation of class counsel's continuing delinquency, we cannot say the court abused its discretion in denying the appellants' motion for further relief.[6]

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[4] Contrary to the appellants' characterization, the Register was *not* an "extra step" but a substitute step, and a less onerous one, which relieved class counsel of their commitment to file all petitions by the November 13, 2001 deadline. The district court therefore reasonably rejected the notion that the Register was a changed circumstance warranting relief.

[5] After the court ordered payment of an interim $7 million fee award on August 4, 2000, class counsel did not seek additional fees until they moved for a third interim award on January 12, 2001, when they did not allege any existing financial hardship but only that they then "*face[d]* significant hardship based on their financing of the implementation of the Consent Decree" for which they had "incurred substantial financial obligations in the form of bank loans." Mem. in Supp. of Mot. for Third Award of Atty's Fees at 3 (filed Jan. 12, 2001) (emphasis added).

[6] The court's abbreviated response on reconsideration may have been influenced as well by its perception of class counsel's indifference toward the filing deadlines: "At the April 19 status conference, Class Counsel made the remarkable admission that they never had a realistic expectation

The dissent contends the district court erred in two respects. First, it argues the court erred in relying on a finding of fact that the "critical changed circumstances" occurred before the parties agreed to the deadline in the S&O. Dissent at 5, 11. We perceive no such error. The court was correct when it found as a fact in its June 2, 2003 decision denying relief that "[t]he exponential increase in *claimants* was fully apparent when plaintiffs and defendant negotiated and agreed to the July 14, 2000 Stipulation and Order," 265 F. Supp. 2d at 47, as the appellants acknowledge.[7] The district court was also correct when it stated in the June 2, 2003 order that "the critical 'changed circumstance' *on which plaintiffs rely* occurred *before*, not after, the relevant deadlines were agreed to by the parties and endorsed by the Court." 265 F. Supp. 2d at 47 (first emphasis added).[8] The appellants had argued at that stage that relief from the deadlines was warranted because of "[t]he predominant change in circumstances, since the Consent Decree was approved in 1999," namely, that "the number

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of meeting the November 13, 2000, deadline they had negotiated with the government, nor did they have any intention of meeting the modified May 15, 2001, deadline set by the Court." 144 F. Supp. 2d at 18.

[7] The appellants state in their brief: "In its June 2, 2003 order, the District Court correctly noted that, as of July 14, 2000 plaintiffs were aware of the vastly greater number of claimants than originally had been anticipated." Appellants' Br. at 22.

[8] Notwithstanding the contrary suggestion in the Dissent at 11, the only reference to "critical changed circumstances" in the reconsideration decision came when the court repeated the statement first made in its June 2, 2003 decision to explain (correctly) that the new argument raised by lawyers who had been "of counsel" when the S&O was entered—that the S&O "itself was a change in circumstances" because non-class counsel "was not involved in the decision to negotiate and agree to the deadlines imposed" in it—likewise suffered from "'the fundamental flaw . . . that the critical 'changed circumstance' on which plaintiffs rely occurred *before*, not after, the relevant deadlines were agreed to by the parties and endorsed by the Court.'" 307 F. Supp. 2d at 49 (quoting 265 F. Supp. 2d at 46).

of participants, with or without counsel, has increased 400-500%, overwhelming the system set up by the Consent Decree," Pls.' Reply to Def.'s Opp'n to Mot. for Relief at 4-5, plainly referring to the increased number of claimants. It is not at all surprising if, as the dissent notes, Dissent at 3, the court's June 2, 2003 order "ignored the key distinction argued by appellants in the motion for reconsideration" of the order, which was filed on June 16, 2003. Further, as we noted *supra*, the court had already granted relief from the increase in meritorious petitions when it established the simplified Register procedure for meeting the November 13, 2000 filing deadline.

Second, the dissent asserts the district court erred as a matter of law by failing to consider whether class counsel's failures to meet the deadlines amounted to an "unforeseen obstacle warranting relief." Dissent at 11. The dissent relies on the court's decision in *Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002) (*Pigford I*), for the proposition that "where class members lack competent counsel, counsel's failure to meet deadlines itself may amount to an 'unforeseen obstacle' that makes the decree 'unworkable.'" Dissent at 6 (quoting *Pigford I*, 292 F.3d at 925). *Pigford I*, however, presented a different situation in two respects. First, contrary to the dissent's characterization, *Pigford I* did not present "the *same* issue of modification of deadlines" as here, Dissent at 9 (emphasis by dissent), so as to implicate law of the case. In *Pigford I* the court modified the consent order to permit arbitrators to extend the deadlines for filing evidentiary materials in Track B litigation, set out in paragraph 10 of the Consent Decree, based on class counsel's "malpractice" in the Track B litigation, namely, "its inability to represent all Track B claimants adequately,'" *Pigford I*, 292 F.3d at 925 (quoting 182 F. Supp. 2d at 52), as exemplified by one lawyer's failure to timely file a claimant's direct testimony with the arbitrator. Here, the appellants seek to modify the S&O's Track A deadlines for filing review petitions under

paragraph 12(b)(iii), relying on their repeated failures to meet the filing deadlines. Second, *Pigford I* came before us in a different posture. In that decision, we rejected the district court's determination that the consent decree could be interpreted to permit extending deadlines but affirmed the decision to extend deadlines based on the alternative ground, not addressed by the district court, that the decree could be so modified under Rule 60(b)(5) because counsel's failures amounted to changed circumstances warranting relief under Rule 60(b)(5). Because we affirmed the district court's decision, we were free to do so, as we did, on a ground not reached by the district court and without reviewing the district court's rationale. *EEOC v. Aramark Corp*, 208 F.3d 266, 268 (D.C. Cir. 2000) ("Although the district court never addressed the safe harbor provision, the issue is fully briefed, and because we review the district court's judgment, not its reasoning, we may affirm on any ground properly raised.") (citing *Doe v. Gates*, 981 F.2d 1316, 1321-22 (D.C. Cir. 1993)). In this case, however, we review the district court's decision not to grant relief and "may overturn such an order only for abuse of discretion." *Summers v. Howard Univ.*, 374 F.3d 1188, 1192 (D.C. Cir. 2004) (citing *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996); *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988)). Although the district court might have been warranted in modifying the deadlines based on class counsel's failure to meet deadlines, as we explained *supra*, the court did not abuse its discretion in declining to do so. For us to decide the question *sua sponte* or require the district court to do so as a matter of law, as the dissent suggests, would infringe on the district court's discretion and run counter to "the presumption of client accountability for attorney conduct" which, as we confirmed in *Pigford I*, applies in class actions. *See Pigford I*, 292 F.3d at 927.

B. Pro Se and Unafiliated Counsel Petitions

Next, the appellants contend the district court abused its discretion in denying relief under its inherent equitable authority to the late filing claimants who were not represented by class counsel and did not, class counsel contends, receive actual notice of the S&O deadlines.[9] In their motion for relief the appellants cited lack of notice as a "changed circumstance" supporting modification of the S&O under either Rule 60(b)(5) or the court's inherent authority because "Track A decision letters issued after July 14, 2000 mistakenly omitted language informing claimants that they had 120 days from the date of the decision to petition the Monitor for review." Pls.' Mem. in Supp. of Mot. for Relief at 13-14. The district court rejected this argument because the S&O did not require the letters to include such notice and therefore its absence was not a changed circumstance.[10] On reconsideration, the appellants took a different tack, arguing that when class members "do not receive actual notice of a deadline by which they must take some action to preserve their claims, and therefore miss the deadline, the District Court may 'exercise its equitable authority to excuse the late filings.'" Pls.'Reply to Def.'s Resp. to Mot. for Recons. at 11-12 (quoting *In re Orthopedic Bone Screw Prods. Liability Litig.*, 246 F.3d 315, 320 (3d Cir. 2001) (alteration original)). The appellants further urged the

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[9] We note that the appellants did not establish below that all of the 208 claimants in fact lacked notice and there is reason to believe that at least some of them did not. *See* Surreply to Pls.'Reply to Def.'s Resp. to Mot. for Recons. at 6 (filed Aug. 15, 2003).

[10] The S&O expressly required only that a copy of its text be posted in every Department Farm Services Agency county office and mailed to everyone who "requested a Claim Sheet and Election Form" but "did not submit a [timely] completed Claim Form." S&O ¶ 7, at 5. The actual notification procedures, however, were far more extensive as the monitor mailed notices to all claimants who filed a completed claim form by August 17, 2000 (approximately 20,652 in all) and all decision letters sent after November 15, 2001 explained the filing deadline. Monitor's Report to Court Regarding Class Notice at 3-5.

court to apply the "excusable neglect" standard in exercising its inherent authority as well as the four factors the Third Circuit adopted under the standard in *Orthopedic*, namely:

> 1) the danger of prejudice to the nonmovant; 2) the length of the delay and its potential effect on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and 4) whether the movant acted in good faith.

246 F.3d at 322-23 (citing *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). The district court applied the Third Circuit's formulation and under the first and third factors found no excusable neglect warranting equitable relief because of the potential prejudice to the Department and the appellants' role in drafting the S&O. The court concluded (1) that the government "'will be prejudiced to the tune of almost one million dollars" if the Court permits consideration of the late petitions and if even five percent of them are successful,'" 307 F. Supp. 2d at 50 (quoting *Pigford v. Veneman*, 265 F. Supp. 2d at 50), and (2) "because the deadlines were negotiated and agreed to by plaintiffs, it logically follows that the resulting failure to meet those deadlines had been within the reasonable control of plaintiffs," *id.* at 50-51. In so concluding the court did not abuse its discretion. As the district court pointed out in the May 27, 2001 order suspending the deadlines: "As part of the bargain struck between the parties and approved by the Court in the Order of July 14, 2000, class counsel agreed to meet the 120 day deadline in return for the government's agreement to admit more than 1,100 Track A claimants into the class who otherwise would have been excluded." 144 F. Supp. 2d at 19 n.2. If the district court had granted the requested relief from the deadlines, the government would have lost the benefit of its bargain—certainty and finality as to its maximum liability as of the agreed upon date—while the claimant class would have recovered the bargained-away right to compensation for claimants filing review petitions beyond the stipulated dead-

lines (as extended by the court).[11] The prejudice to the government distinguishes this case from In *re Orthopedic* in which the court found the defendant would suffer no prejudice because the addition of claimants would have "no effect on the amount [the defendant] would pay to those aggrieved by its products" as its liability had been capped by a settlement agreement. 246 F.3d at 323. Here, because there is no cap, the expansion of the number of successful claimants (which would result from extending the deadline) will substantially expand the Department's monetary liability. *See id.* (noting consideration of prejudice there was "a unique inquiry" and expansion of plaintiff class "in the ordinary class action will be to the detriment of the defendant"); *cf. Grace v. Detroit*, 145 F.R.D. 413, 417 (E.D. Mich. 1992) ("Unlike the cases cited by Plaintiff, . . . in this case there is no fixed settlement fund. Every tardy claim accepted would be an expansion of Defendant City's liability for a reason not originally ordered. The total sum of Defendant's liability is yet to be determined, and increases with each successive claimant.").

For the foregoing reasons, the district court's orders denying the appellants' motions are affirmed.

So ordered.

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[11] The dissent inexplicably faults our reference to the district court's May 27, 2001 finding that the government bargained for the November 13, 2000 filing deadline in explaining the district court's finding of prejudice to the government made in its June 2, 2003 order denying the appellants' motion for Rule 60(b) relief. *See* Dissent at 13. We doubt that in the interim the district court either forgot or changed its mind about the quid pro quo nature of the order setting the deadlines, the modification of which, the court found, would prejudice the government in an amount upwards of $1 million. Nor do we agree with the dissent's characterization of the district court's findings regarding the government's negotiation of the July 14, 2000 S&O deadline and potential prejudice from its extension as "ironic" or in any way inconsistent with its earlier finding on the fairness of the Consent Decree (which notably lacked a filing deadline) in its April 14, 1999 order. *See* Dissent at 13.

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: The history of this litigation bears witness to the many obstacles to relief for the class of African American farmers covered by a consent decree based on their allegations of unlawful racial discrimination by the United States Department of Agriculture in administering its farm loan programs. The task has not been easy for a number of reasons, including the complications necessarily associated with ensuring relief to eligible class members and the deficiencies of class counsel, as determined by the district court. While the district court's efforts so far have ensured that only a small portion of the class will not have their claims for Monitor review considered, as a result of the court's decision today, the claims of 305 class members are unduly extinguished: 97 farmers will lose the opportunity to have independent administrative review of their claims by a Monitor in accordance with the claims procedure in the consent decree, and 208 farmers (170 without counsel), who may not have received notice of the filing deadlines, will lose their opportunity to pursue their claims at all.

In denying appellants' motion of July 19, 2002 for relief for these 305 class members, and the motions for reconsideration of June 13 & 16, 2003, the district court clearly erred in relying on a finding of fact regarding the increased claims workload, and erred, alternatively, as a matter of law by failing to consider, in accordance with Pigford v. Veneman, 292 F.3d 918 (D.C. Cir. 2002) ("*Pigford I*"), whether class counsel's untimely filings was a changed circumstance within the meaning of Federal Rule of Civil Procedure 60(b)(5). It also erred by failing to inquire whether 208 claimants' late filings were due to the inadequacy of the notice procedures before determining whether to deny any relief under Federal Rule of Civil Procedure 6(b). Accordingly, while I concur in the holding that the July 14, 2000 Order establishing the original filing deadlines was a final appealable order, *see* Op. at 8, I would reverse and remand

the case to the district court to determine whether the filing deadlines were "unworkable," and thus warranting relief for 97 class members pursuant to Rule 60(b)(5), and to determine whether 208 class members failed to receive notice of the filing deadlines as a result of inadequate notice procedures and were entitled to relief under Rule 6(b).

I.

The question on appeal is whether the district court abused its discretion in denying appellants' motions for an extension of the filing deadlines, and for reconsideration under Rule 60(b). *Evans v. Williams*, 206 F.3d 1292, 1299 (D.C. Cir. 2000); *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992). While our review is deferential, an abuse of discretion occurs when the district court relies on clearly erroneous findings of fact, fails to consider a relevant factor, or applies the wrong legal standard. *See In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003); *Evans*, 206 F.3d at 1298; *Marina Mgmt. Servs. Inc. v. Vessel My Girls*, 202 F.3d 315, 321 (D.C. Cir. 2000); *see also Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995).

Rule 60(b)(5) provides, in relevant part, that "the court may relieve a party . . . from a final judgment, order or proceeding [if] . . . it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). A movant under Rule 60(b)(5) must demonstrate "changed circumstances" since the entry of the judgment from which relief is sought. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383, 385 (1992). Such change need not be "unforeseeable, but only unforeseen." *Id.* at 385. The Supreme Court in *Rufo* explained,

> Ordinarily . . . modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree.

> [citations omitted] If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Id. In *Pigford I*, the court held that changed circumstances may include "unforeseen obstacles" that make an order "unworkable." *Pigford I*, 292 F. 3d at 925; *see Rufo*, 502 U.S. at 384.

The district court found that the large increase in the number of claimants occurred *before* the deadlines in the July 14th Order were agreed to, and therefore did not amount to unanticipated "changed circumstances" rendering the deadlines "unworkable" within the meaning of Rule 60(b)(5). *See Pigford v. Veneman*, 265 F. Supp.2d 41, 47 (D.D.C. 2003), *reconsideration denied, Pigford v. Veneman*, 307 F. Supp.2d 43 (D.D.C. 2004). In so finding the district court, as does the court today, Op. at 12-13, ignored the key distinction argued by appellants in their motion for reconsideration and supported by evidence in the record. Appellants pointed out that the critical "changed circumstance" was not the vastly greater number of *total* claimants, but the unanticipated large number of claimants seeking Monitor review because their claims likely had been denied erroneously in the first instance by the adjudicator, and had potentially meritorious grounds for seeking Monitor review. Appellants explained that class counsel originally had anticipated that the vast majority of would-be seekers of Monitor review would not meet the high standards for such review set forth in the consent decree—"clear and manifest error" that is "likely to result in a fundamental miscarriage of justice," Consent Decree ¶ 12(b)(iii)—and therefore, at the time they agreed to the July 14th Order deadlines,

had estimated that only approximately 2,500 petitions would require processing for Monitor review. However, class counsel subsequently discovered that a much higher number of the claims rejected by the adjudicator were potentially meritorious claims even under the high standard for Monitor review. In fact, the total volume of claims actually processed for Monitor review was much higher than 2,500: Class counsel and the of-counsel law firm Chestnut, Sanders ended up processing 3,700 Track A requests for Monitor review, with other firms processing other, smaller numbers of requests.

In support of this distinction, appellants pointed to the high success rates of claims upon Monitor review: The facilitator's report cited by appellants indicated that approximately 48% of the claimants who had filed for review with the assistance of counsel had been approved by the Monitor for reexamination by the adjudicator, and 100% of reexamined petitions prevailed on the merits. This statistical evidence substantiated class counsel's argument that many meritorious claims had been erroneously denied by the adjudicator, necessitating the filing of petitions for Monitor review and creating more work for class counsel than was anticipated when the July 14th Order deadlines were agreed to.

The record further indicates that the number of class members seeking Monitor review was unanticipated by either party or by the district court when the parties agreed to those deadlines. As noted, when the district court established the Register of Petitions process in the November 11, 2000 Order, class counsel was estimating a total of 2,500 petitions for Monitor review. The district court relied on this estimate to set the filing schedule for fully supported petitions. The November 11th Order further indicated that the higher volume of petitions for Monitor review was not anticipated, for the district court acknowledged that neither the Depart-

ment nor the Monitor were prepared to handle and process the higher volume of petitions. The court stated:

> It is obvious that if Class Counsel, Of Counsel and all unaffiliated counsel were forced to file thousands of fully supported Petitions by November 13, the government would be unable to respond to them in a meaningful way within the 60 days that it has to file a response. [citation omitted] Furthermore, the Monitor informed the Court at the hearing that even if the government had the resources to complete such a task, the Monitor initially will be unable to decide the Petitions at a pace greater than 200 to 300 each month.

Indeed, the district court later acknowledged at the April 19, 2001 status conference that "some of the failings of the lawyers, if we want to call them that, are simply because people were overworked. *There was much more to be done than people thought.*" (emphasis added).

In light of the record evidence that the high number of class members seeking Monitor review was unanticipated at the time the July 14th Order deadlines were agreed to, the district court clearly erred in relying on its finding in its opinion of June 2, 2003 that the "critical 'changed circumstance'" had "occurred *before*, not after, the relevant deadlines were agreed to," in denying appellants' motion for reconsideration in its opinion of March 19, 2004, *Pigford*, 307 F. Supp. 2d at 48, without distinguishing between the overall number of claimants and the number of petitions for Monitor review. Instead, the district court denied reconsideration stating that, notwithstanding appellants' "further elaboration," "the [c]ourt declines to revisit its determination that the asserted 'changed circumstances' presented by [appellants] do not justify modification of the [c]ourt's prior orders under Rule 60(b)(5)." *Id.* While the court states that the district court established the Register procedure to provide relief from the increased volume of meritorious petitions, Op.

at 13, that relief created filing problems of its own and, in any event, the district court underestimated the volume of Monitor-review petitions even then.

Moreover, in denying appellants' motions, the district court failed to consider the instruction of *Pigford I* that where class members lack competent counsel, counsel's failure to meet deadlines itself may amount to an "unforeseen obstacle" that makes the decree "unworkable" under Rule 60(b)(5). *Pigford I*, 292 F.3d at 925. In *Pigford I*, this court embraced the concept that the district court has a duty to protect class members where such members did not choose their counsel and where retention of other lawyers is unlikely, 292 F.3d at 926-27, a concept embraced by other circuits as well.[1] Noting that the consent "decree's express purpose is to 'ensur[e] that in their dealings with [the Department], all class members receive full and fair treatment,' Consent Decree at 2, and its 'main accomplishment was the e*stablishment of a process* to adjudicate individual claims,'" this court distinguished between the failings of class counsel and the opportunity of class members to avail themselves of the remedial scheme under the consent decree: The court opined that there was "no basis for holding [the class members] responsible for [counsel's] failure" to meet deadlines which had been bargained for by the parties, *Pigford I*, 292 F.3d at 927, and held that relief was appropriate under Rule 60(b)(5) because "class counsel's

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[1] *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005) (citing Fed. R. Civ. P. 23(e)); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 321 (3d Cir. 2001); *In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27 (3d Cir. 1980); *Zients v. LaMorte*, 459 F.2d 628, 629-30 (2d Cir. 1972); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005); *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 280-81 (7th Cir. 2002); *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973). While the district court noted that these cases involved earlier stages of class action proceedings, it failed to articulate any reason why this principle would not apply at the remedial stages of class action proceedings. *See Pigford*, 307 F. Supp.2d 43, 50 (D.D.C. 2004).

failure to meet critical Track B deadlines amounts to an 'unforeseen obstacle' that makes the decree 'unworkable,'" *id.* at 927 (quoting *Rufo*, 502 U.S. at 384).

This conclusion in *Pigford I* is no less applicable now than it was then, for "[t]o hold otherwise would sanction the farmers' double betrayal: first by the Department . . . and then by their own lawyers." *Id.* In granting an extension of Track B deadlines missed due to attorney error, the district court had previously acknowledged that the general rule that attorney error is not excusable should not apply here, where "[t]he history of this case is unique . . . and requires more than hasty application of general practice." *Pigford v. Veneman*, 182 F. Supp.2d 50, 52 (D.D.C. 2002). This court observed in *Pigford I* that,

> [T]he decree itself assumes competent representation for the farmers. The decree's express purpose is to "ensur[e] that in their dealings with [the Department], all class members receive full and fair treatment," . . . and its "main accomplishment was the establishment of a process to adjudicate individual claims." . . . Unless the farmers have competent counsel, we cannot imagine how they could ever obtain "full and fair treatment" in a claims process where . . . missing a single deadline could be fatal.

292 F.3d at 927 (quoting Consent Decree, at 2; *Pigford v. Glickman*, No. 97cv01978 (D.D.C. Mar. 8, 2001)). Not only has the district court found class counsel's performance sanctionable and imposed severe monetary fines on them, *Pigford v. Veneman*, 307 F. Supp.2d 51 (D.D.C. 2004), but at a time when there was, as the district court stated, "much more to be done than people thought," and the critical filing deadlines were drawing near, class counsel and of-counsel were in dire financial straits as a result of the lack of payment of interim

fees by the government, as appellants reminded the district court in their motion for reconsideration.[2] The district court

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[2] Six months before the November filing deadline, the motion of May 8, 2000 for an interim award of attorneys' fees, costs and expert fees filed by class counsel and certain of-counsel stated:

> It is now nearly three years since this case began. During this time the firms incurred crushing expense. For example, [class counsel] Conlon, Frantz incurred substantial obligations—borrowing $1,000,000 simply to remain solvent. Mr. Pires was not paid for over 15 months. He obtained multiple mortgages to pay his personal expenses. . . . [The Of-counsel law firm of] Chestnut, Sanders was forced by the scope of the litigation to borrow $1 million, hire new employees and cut partner salaries by 60%.

On August 4, 2000, the district court, acknowledging "the dire financial straits in which several firms affiliated with class counsel currently find themselves," ordered an immediate preliminary award to counsel of $7 million, which covered only previously incurred costs and amounted to less than one-half the cumulative loadstar amount of $14,582,703. Although, in response to class counsel's motion for an extension of the July 14th Order deadlines, the district court set up the Register of Petitions process in November 2000, counsel still missed filing deadlines. When the parties' attempt, at the district court's suggestion, to resolve their differences regarding counsel's May 8th request fees and costs proved unsuccessful, on January 12, 2001 class counsel, of-counsel, and one counsel moved for additional interim fees alleging "significant hardship" as a result of continued financing of implementation of the Consent Decree, without the regular payment of fees, through bank loans to cover staff salaries and expenses. A further payment of interim fees and costs was ordered on March 8, 2001, well after the filing deadlines, and still, because of the government's resistence, class counsel did not receive any payment until July 2001, of $14.9 million, *see Pigford v. Veneman*, 369 F.3d 545 (D.C. Cir. 2004); a further payment of $500,000 was ordered on December 2, 2002, *Pigford v. Veneman*, 239 F. Supp. 2d 68, 71 (D.D.C. 2002). The delay in approving payment and the delay in actual receipt of interim fees by class counsel are ignored by the court in discussing the district court's "repeated accommodation of class counsel's continuing delinquency." Op. at 11.

recognized at a status conference held on April 19, 2001 that the delay in awarding interim fees

> had an impact on the number of lawyers and the amount of time that those lawyers are spending *on the Monitor petition process*. . . . if you have to succeed or prevail to get paid, then getting new lawyers in the act would be hard, and I understand that it is also having an impact on the existing lawyers. [Class counsel] has cut back on [its] staff.

(emphasis added).

Today, by affirming the denial of appellants' motions, the court ignores our analysis in *Pigford I* and the duty of the trial judge to protect class members who do not chose their own counsel when unanticipated circumstances have created "a situation where there were too many cases and too few lawyers." Br. for Appellants at 22. By declining to account for *Pigford I*'s contrary holding as an infringement of the district court's discretion, Op. at 14, the court ignores that *Pigford I* involved the *same* unique history, the *same* consent decree, the *same* class counsel, and the *same* issue of modification of deadlines missed by class counsel under Federal Rule of Civil Procedure 60(b)(5) considered in the *same* court, and as such its holding is nearly akin to the law of the case, in addition to being law of the circuit. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393, 1395 (D.C. Cir. 1996) (en banc). That *Pigford I* involved claims under Track B rather than Track A does not change the fact that the legal issue before the court is the same: whether appellants are entitled to relief under Rule 60(b)(5) for counsel's failures to meet filing deadlines. *See* Op. at 13-14. While the court points out that *Pigford I* acknowledged "the presumption of client accountability for attorney conduct," *id.*, it ignores that *Pigford I* also found this presumption overcome because class counsel was not freely chosen by class members and the circumstances of the case, together with the terms of the decree, made retention

of other lawyers "unlikely." *Pigford I*, 292 F.3d at 926. Here, the very same circumstances remain, and were further exacerbated by additional unanticipated circumstances which created "a situation where there were too many cases and too few lawyers." Br. for Appellants at 22. This court cannot avoid, by pointing to "a different procedural posture," Op. at 13, that the district court is bound, under *Pigford I*, *see LaShawn A.*, 87 F.3d at 1393, 1395, to separate class counsel's failings from the claims of the class members, particularly in light of the district court's affirmative duty to "renew its stringent examination of the adequacy of class representation throughout the entire course of the litigation," *In re Fine Paper Antitrust Litigation*, 617 F.2d 22, 27 (3d Cir. 1980), and that the district court's failure to do so is an abuse of discretion, *Evans*, 206 F.3d at 1298.

Finally, while the Secretary would distinguish *Pigford I* as concerned with extinguishing a class member's claim, *see Pigford I*, 292 F.3d at 922, from the denial of an opportunity to seek Monitor review, from the perspective of the class member whose claim has been wrongfully denied, the effect is the same: Neither class member will have the opportunity to utilize the remedial process established in the consent decree. Taken together, the circumstances identified in appellants' motions suggest that the 97 class members should not bear the burden of counsel's failures to meet filing deadlines. In order to avoid a "double betrayal" of the class members, the district court was required to separate the failures of counsel from the claims of the class members in order to ensure that the opportunity to pursue the claims process established in the consent decree not be foreclosed. *Id.* at 927. It did not do so, and the court today fails to explain how the district court fulfilled its responsibilities in accordance with the analysis in *Pigford I*.

Because the district court, in denying the motion for reconsideration, erroneously relied on its finding in its opinion of

June 2, 2003 that the "critical changed circumstance" occurred before the July 14th Order deadlines were agreed to without taking into account record evidence demonstrating that the volume of petitions for Monitor review—the relevant change in circumstance—was not anticipated at the time the deadlines were agreed to, and in the alternative erred as a matter of law by failing to consider whether class counsel's failures to meet the deadlines amounted to an "unforeseen obstacle" warranting relief, I would reverse and remand the case to the district court to address whether the deadlines were "unworkable" under Rule 60(b)(5).

II.

Additionally, the district court failed to inquire whether adequate notice was provided to 208 class members, for whom appellants proffered evidence that these class members had not received notice of the filing deadlines for Monitor review, in determining whether relief was warranted under the "excusable neglect" standard of Federal Rule of Civil Procedure 6(b).

The July 14 Order modified the consent decree to limit the period within which class members could seek Monitor review of denied claims and, as the district court noted, it did not provide for individual notice to unsuccessful Track A class members. Instead, the July 14th Order required only that a copy of it be (1) posted in every USDA Farm Services Agency county office, and (2) sent by the facilitator to those persons who requested a claim sheet and election form. According to the Monitor's Report, "few people eligible to file a petition with the Monitor would have received direct notice of the 120-day deadline from the mailing," and many claimants would not see a posting in a USDA Farm Services Agency county office. *See* Monitor's Report to the Court Regarding Notice to the Class of the 120-Day Deadline to File a Petition for Monitor Review (May 30, 2003). The Monitor attempted to remedy the situation by mailing addi-

tional notices to farmers who had either requested or made telephonic inquiries regarding claim forms. Still, appellants proffered evidence that 208 class members had received no notice of the filing deadlines. *See, e.g.*, Joint Appendix at 186; 218-233, 248, 254, 256, 258, 265, 268, 269, 286, 321; *id.* at 423.

Nonetheless, the district court denied relief under the "excusable neglect" standard of Rule 6(b). Applying the four-factor test of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 398-99 (1993), the district court found first, that the government would be "prejudiced to the tune of almost one million dollars" by allowing consideration of late petitions if five percent were successful, and second, that "because the [July 14th Order] deadlines were negotiated and agreed to by the [appellants], it logically follows that the resulting failure to meet those deadlines had been within the reasonable control of [appellants]." Each finding is problematic given the district court's duty to ensure that adequate notice procedures were, in fact, established to provide class members with notice of filing deadlines. The district court made no finding that appellants were not proceeding in good faith or that there would be undue delay of the proceedings by granting relief.

The district court's finding of "prejudice" to the government is ironic. *See Pigford v. Glickman*, 185 F.R.D. 82, 95 (D.D.C. 1999); *see also Pigford I*, 292 F.3d at 927. In approving the consent decree, the district court observed that "the settlement is a fair resolution of the claims brought in this case and a good first step towards assuring that the kind of discrimination that has been visited on African American farmers *since Reconstruction* will not continue into the next century." *Pigford*, 185 F.R.D. at 86 (emphasis added). The July 14th Order deadlines were not imposed in order to limit the government's liability as such, but rather, according to the district court, to bring closure to the process through fair

procedures that would identify the number of class members seeking Monitor review. Moreover, the dollar amount of prejudice claimed by the Secretary represents 0.04% of the estimated settlement, *see Pigford*, 206 F.3d at 1244, and 0.125% of the amount actual paid out by the government at that time. This court, in turn, mistakenly relies on the Secretary's argument that class counsel's agreement that the July 14th Order deadlines would not be extended was the *quid pro quo* for its agreement to admit other Track A claimants into the class who would otherwise have been excluded. *See* Op. at 16-17; Br. for the Appellee at 24. This is not the analysis adopted by the district court in denying appellants' motions; instead, the district court addressed that *quid pro quo* in imposing monetary sanctions on class counsel in a separate order, *see Pigford v. Veneman*, 144 F. Supp.2d 16, 19 n.2 (D.D.C. 2001), which is not on appeal.

The district court's second finding, that the failure to meet the deadlines was within the farmers' control because they agreed to the July 14th Order deadlines, is clearly erroneous because it ignored the threshold question of whether the agreed-to notice provisions ensured that adequate notice would be provided to class members, many proceeding *pro se*, whose claims had been denied by the adjudicator. The fact that class counsel agreed to the notice procedures did not discharge the district court's obligation to ensure notice was directed in a reasonable manner. *Cf.* Fed. R. Civ. P. 23(e)(1)(B); *Doe v. Lexington-Fayette Urban County Gov't*, 2005 U.S. App. LEXIS 7771, at *11-12 (3d Cir. 2005); *Pigford I*, 292 F.3d at 926 (citing Fed. R. Civ. P. 23(a)(4)). Once the Monitor determined that the notice procedures were inadequate and appellants proffered evidence that 208 class members claimed not to have received notice, the district court had a duty to inquire whether the notice procedures were adequate in fact. In an analogous context, the Second Circuit pointed out that the district court has "the inherent power and duty to protect unnamed, but interested persons,"

Zients v. LaMorte, 459 F.2d 628, 630 (2d Cir. 1972), and although the notice procedures in the settlement agreement were complied with, the Second Circuit reversed the exclusion of claims filed late due to the lack of actual notice, *id.* As the Third Circuit observed, the district court's equitable powers under Rule 23 "are retained by the court until the settlement fund is actually distributed." *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 321 (3d Cir. 2001).

Whether the prejudice to the government outweighed other considerations could not be determined by the district court until it first determined—in light of the proffered evidence that the agreed-to notice procedures were inadequate for 208 class members—the adequacy of the agreed-to notice procedures, and whether the late filings were the result of inadequate notice. Only then could the district court determine whether the 208 class members were entitled to relief under Rule 6(b). Therefore, I would reverse and remand the case for the district court to determine the adequacy of the notice procedures and whether the 208 class members were entitled to relief. *See Pigford I*, 292 F.3d at 925-27; I*n re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d at 321-29; *Zients*, 459 F.2d at 630.

Accordingly, I respectfully dissent from Part II of the court's opinion.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed March 10, 2004]

Civil Action No. 97-1978 (PLF)

TIMOTHY PIGFORD, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary,
United States Department of Agriculture,
Defendant.

Civil Action No. 98-1693 (PLF)

CECIL BREWINGTON, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary,
United States Department of Agriculture,
Defendant.

OPINION

The Court has before it two motions for reconsideration of the Court's June 2, 2003 Opinion and Order denying plaintiffs' motion for relief for four groups of claimants who filed petitions for Monitor review. Upon consideration of plaintiffs' motions, defendant's response, plaintiffs' reply and defendant's surreply, the Court concludes that both motions for reconsideration must be denied.

I. BACKGROUND

On April 14, 1999, this Court approved and entered a Consent Decree in these consolidated actions that was designed to bring resolution and finality to the claims of race discrimination of those class members who opted to have their claims resolved under the adjudication or arbitration processes provided in the Consent Decree. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000). The Consent Decree provided that the Court would appoint an independent Monitor and that the Monitor would have the authority to direct the facilitator, adjudicator, or arbitrator to reexamine a claim if the Monitor determined that a "clear and manifest error" had occurred and had resulted in, or was likely to result in, a "fundamental miscarriage of justice." Consent Decree ¶ 12(b)(iii). The Consent Decree did not provide a time limit within which a claimant could petition for Monitor review of his or her claim. *See id.*

To bring finality to the proceedings under the Consent Decree, the parties stipulated on July 14, 2000, that any claimant who had already received an adverse decision from the Adjudicator would have 120 days from the date of the Order, until November 13, 2000, to file a petition for Monitor review. *See* July 14, 2000 Stipulation and Order ("Stipulation and Order") at 4.[1] They further stipulated that all claimants who were to receive adjudication decisions after July 14, 2000 would have 120 days from the date of their adverse decision to file a petition for Monitor review. *See id.* The Stipulation and Order specifically provided that "[n]o extensions of these deadlines will be granted for any reason." *Id.* The Court approved this agreement. *See id.*[2]

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[1] Although the Stipulation and Order applied to both Track A (Adjudicator) and Track B (Arbitrator) decisions, plaintiffs' motions and this Opinion deal only with the former.

[2] On behalf of plaintiffs, the stipulation was signed by class counsel, Alexander Pires and Phillip L. Fraas. Also listed were of counsel: J.L.

The Court provided in a later Order that instead of filing fully supported petitions for Monitor review, counsel could instead submit a Register of Petitions that would list all claimants who received a decision prior to the July 14, 2000 Stipulation and Order and had asked counsel to provide assistance with the filing of his or her petition for Monitor review. *See Pigford v. Veneman*, No. 97-1978, 2000 U.S. Dist. LEXIS 16374, *9 (D.D.C. Nov. 8, 2000). The Court entered this Order, permitting such an abbreviated process, in order "to ensure that claimants would not bear the burden of counsel's inability to process Petitions at a rate sufficient to meet the November 13 deadline" agreed to in the July 14 Stipulation. *Id.* at *6. The November 8 Order laid out a time frame for filing fully supported petitions and provided that all supporting materials had to be filed no later than May 15, 2001. *See id.* at *9-11. On May 15, 2001, the Court reluctantly changed the deadline for filing supporting materials and withdrawals, setting a final deadline of September 15, 2001 to complete the petition process. *See Pigford v. Veneman*, 143 F. Supp. 2d 28, 31 (D.D.C. 2001).

The Register process discussed above did not apply to claimants receiving a decision from the Adjudicator after July 14, 2000; these claimants' petitions therefore were untimely if they were filed more than 120 days after the Adjudicator's decision. *See Pigford v. Veneman*, 143 F. Supp. 2d at 31. The deadline was never modified as to claimants who received their Adjudicator decisions after July 14, 2000.

The Register process also did not apply to claimants who received their adverse Adjudicator decisions before July 14, 2000, but whose names were not placed on the Register.

Chestnut; Othello Cross; Willie Smith; Gerald R. Lear and Hubbard I. Sanders, IV. *See* Stipulation and Order. On December 22, 2000, the Court issued an Order amending the Consent Decree to include J.L. Chestnut as class counsel. *See* December 22, 2000 Order.

Petitions for individuals in this situation therefore were untimely if they were not filed by the original November 13, 2000 deadline set by the Stipulation and Order. *See Pigford v. Veneman*, No. 97-1978, 2000 U.S. Dist. LEXIS 16374 at *9.

Several hundred petitions fitting into these two excluded categories, as well as those of a few other claimants with more unique circumstances, were declared untimely by the Facilitator because they were submitted after the deadlines set by the Stipulation and Order. Plaintiffs moved the Court to direct the Facilitator to process these petitions despite their untimely nature. *See* Plaintiff' Motion for Four Groups of Claimants Who Filed Petitions for Monitor Review. On June 2, 2003, the Court issued an Opinion and Order denying relief for a total of 350 individual claimants whose petitions for Monitor review had been deemed untimely. *See Pigford v. Veneman*, 265 F. Supp. 2d 41 (D.D.C. 2003).

II. DISCUSSION

Plaintiffs' original motion for relief argued that the Court could interpret and modify the Orders imposing the deadlines under Rule 60(b) of the Federal Rules of Civil Procedure or exercise its inherent equitable authority to modify the decrees. *See* Plaintiffs' Motion for Relief for Four Groups of Claimants Who Filed Petitions for Monitor Review at 32-36. The Court determined, however, that since the requested relief could not be granted without modification of the Court's previous orders, allowing the petitions to be filed could not be viewed as mere "interpretation." *Pigford v. Veneman*, 265 F. Supp. 2d at 45. The Court therefore determined that the motion for relief would be governed by the legal standard for modification. *See id.*[3]

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[3] On June 21, 2002, the United States Court of Appeals had reversed an earlier decision of this Court "interpreting" another provision of the Consent Decree. *See Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002). The Court of Appeals held that "the district court's interpretive and en-

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part that "upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [where] . . . [5] it is no longer equitable that the judgment should have prospective application; or . . . [6] [for] any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). For a judgment to no longer be equitable, plaintiffs must identify a "significant change in circumstances" justifying modification. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992). This Court concluded in its earlier Opinion that the circumstances described by plaintiffs (attorney error due to the high volume of petitions and inadequate notice of the 120-day deadline) did not warrant modification of the Court's previous Orders. *See Pigford v. Veneman*, 265 F. Supp. 2d at 46-50. The Court noted that the high volume of petitions was apparent at the time the Stipulation was negotiated by counsel for the parties and approved by the Court; accordingly, there were no changed circumstances based on attorney error. *See id.* at 46-48. Similarly, the Court held that the Stipulation and Order did not require language regarding the 120-day deadline to be included in the Track A and Track B decisions of the Adjudicator and Arbitrator and that the absence of such language also did not constitute changed circumstances. *See id.* at 47-49. The Court also found that various unique situations presented by a handful of other claimants did not warrant relief from the Court. *See id.* at 49-

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forcement authority depends on the terms of the decree and related court order, rather than on some 'ancillary' or 'inherent' power." *Id.* at 925. "To now hold that the district court, through either some 'ancillary' authority to enforce the decree absent a violation or 'inherent' authority to interpret it, may permit extensions of Track B deadlines would not only deny the Department [of Agriculture] the benefit of its bargain, but would also discourage settlements." *Id.* This Court is bound by the holding of the Court of Appeals and must apply the principles announced by the Court of Appeals in resolving issues under the Consent Decree.

50. The Court concluded that plaintiffs had "failed to demonstrate changed circumstances sufficient to justify modification either under Rule 60(b) or the Court's inherent equitable powers" and denied plaintiffs' motion for relief. *Id.* at 51. Plaintiffs now ask the Court to reconsider that decision.

Plaintiffs have filed two separate motions for reconsideration of the Court's June 2, 2003 Opinion and Order.[4] Because both raise similar issues, they will be dealt with together.

A. Rule 60(b)

Plaintiffs repeat their previous arguments that the Court should grant relief under Rule 60(b) of the Federal Rules of Civil Procedure. *See* Conlon Motion at 6-18; Chestnut Motion at 9-21. Arguments are made both under Rule 60(b)(5), which was discussed at length in the Court's June 2, 2003 Opinion and Order, and Rule 60(b)(6). As an initial matter, the Court declines to revisit its determination that the asserted "changed circumstances" presented by plaintiffs do not justify modification of the Court's prior orders under Rule 60(b)(5). The Court is well aware of the circumstances surrounding these petitions and further elaboration does not change this Court's opinion that plaintiffs have not demonstrated changed circumstances sufficient to justify modification of the Court's Orders under Rule 60(b)(5).

Plaintiffs also urge the Court to exercise its discretion to grant relief to the claimants under Rule 60(b)(6), which provides that relief may be granted for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6); *see* Chestnut Motion at 13; Conlon Motion

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[4] Conlon, Frantz, Phelan & Pires, LLP filed a motion for reconsideration of the Court's Order of June 2, 2003 ("Conlon motion") on June 16, 2003, which was joined by J.L. Chestnut, Jr. on July 9, 2003. Chestnut, Sanders, Sanders, Pettaway & Campbell, LLC also submitted a motion for reconsideration of the Court's Order on June 16, 2003 ("Chestnut motion").

at 6. Although both parties represent this as a "new" argument, the language of Rule 60(b)(6) was included both in plaintiffs' initial motion for relief and in the Court's Opinion. *See Pigford v. Veneman*, 265 F. Supp. 2d at 45; Plaintiffs' Motion for Relief for Four Groups of Claimants Who Filed Petitions for Monitor Review at 33. Although the Court explicitly analyzed plaintiffs' request under Rule 60(b)(5), this does not mean that it was unaware of Rule 60(b)(6). *See Pigford v. Veneman*, 265 F. Supp. 2d at 45.

Relief under Rule 60(b)(6) is reserved for "extraordinary circumstances." *Goland v. CIA*, 607 F.2d 339, 372-73 (D.C. Cir. 1979); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 n.10 (1988). Relief under Rule 60(b)(6) is not available "unless the other clauses, (1) through (5), are inapplicable." *Goland v. CIA*, 607 F.2d at 372-73; *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 864 n.10 ("This logic, of course, extends beyond clause (1) and suggests that clause (6) and clauses (1) through (5) are mutually exclusive"). "If the reasons offered for relief from judgment could be considered under one of the more specific clauses of Rule 60(b)(1)-(5), those reasons will not justify relief under Rule 60(b)(6)." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.48[2] (3d ed. 2002).

The Court concluded in its June 2, 2003 Opinion and Order that the "specific circumstances" described in plaintiffs' motion and attached exhibits did not justify the modification of its Orders. *Pigford v. Veneman*, 265 F. Supp. 2d at 45. In analyzing plaintiffs' request under Rule 60(b)(5), the Court obviously concluded that Rule 60(b)(5) was applicable but that plaintiffs had not satisfied the requirements of that subsection of the Rule. Under the established principle that Rule 60(b)(6) is not available where another subsection of Rule 60(b) provides the proper analytical framework for consideration, plaintiffs cannot obtain relief under Rule 60(b)(6) merely because they have failed to satisfy the strictures of

Rule 60(b)(5). *See* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.48[2] (3d ed. 2002) ("The provision applies only when there are reasons for relief other than those set out in the more specific clauses of Rule 60(b). To read the provision any other way would eliminate the need for the specific provisions and would eliminate the limitations that are imposed on those specific provisions.") Even were analysis appropriate under Rule 60(b)(6), the Court finds that the "extraordinary circumstances" required for relief are not present here. The Court therefore declines to disturb its ruling declining to grant relief under Rule 60(b).

The Chestnut motion offers the additional argument that the Stipulation and Order itself was a change in circumstances because the Chestnut firm, which was still Of Counsel at the time of the Stipulation, was not involved in the decision to negotiate and agree to the deadlines imposed by the Stipulation. Although the cases cited by the Chestnut motion deal specifically with the negotiation of settlement agreements, the courts of appeals do acknowledge that lead counsel have the responsibility to keep other counsel apprised of negotiations and to consult with them about settlement terms. *See In Re Ivan F. Boesky Securities Litigation*, 948 F.2d 1358, 1365 (2d. Cir. 1991); *In Re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1124-33 (7th Cir. 1979). The Court properly assumed that the Chestnut firm was aware of the Stipulation by the time it was approved by the Court.

As the government points out, the Stipulation and Order contained a provision stating that, "[a]ny person who objects to any aspect of this Stipulation and Order shall submit his/her objections to the Court in writing not later than 30 days from the date of the entry of this Order." Stipulation and Order at 5. Notwithstanding the Chestnut motion's assertion that it entered a "verbal objection" with the Court—further support that it knew of the existence of the Stipulation and

Order—the firm failed to file any written objection to the Stipulation and Order as was required by its clear language. Although it is true that all counsel should be involved to the extent practicable in the negotiation process, "knowledge and extended silence might easily support a finding of implied consent or estoppel." *In Re Boesky*, 948 F. 2d at 1367.

Regardless of the circumstances surrounding the negotiation of the Stipulation, the Court is unconvinced by the argument that the adoption of the Stipulation and Order can constitute "changed circumstances" that would justify modification of the Stipulation and Order itself. As the Court explained in denying relief on the grounds asserted in plaintiffs' original motion for relief, "the fundamental flaw in this reasoning is that the critical 'changed circumstance' on which plaintiffs rely occurred *before*, not after, the relevant deadlines were agreed to by the parties and endorsed by the Court." *Pigford v. Veneman*, 265 F. Supp. 2d at 46. If the Chestnut firm objected to the deadlines imposed by the Stipulation and Order, its proper course of action was to file its objections with the Court at the time the Stipulation and Order was adopted by the Court or within 30 days thereafter, not to later seek relief under Rule 60(b).

B. Finality of July 14, 2000 Stipulation and Order

Plaintiffs suggest for the first time in their motion for reconsideration that the Court has the power to modify the Stipulation and Order because the Order was interlocutory, not final. *See* Conlon Motion at 2. In support of this argument, plaintiffs argue that the Stipulation and Order cannot be considered final because it was modified by later Orders, specifically those of November 8, 2000, April 27, 2001, and May 15, 2001. *See* Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motions for Reconsideration at 6. They argue that the Court therefore is not bound by the strictures of Rule 60(b) in deciding whether to modify its Orders. *See* Conlon Motion at 3. This argument is unpersuasive. At the time the

Court approved the *July 14 Stipulation*, its Order was intended to be a final resolution of the deadlines involved in the Petition process. The fact that certain modifications were later made to the deadlines set out in the Stipulation and Order at the request of plaintiffs does not alter the fact that it was intended to be, and is, a final decision. The modifications made to it by the Court in its subsequent Orders were governed by Rule 60(b) of the Federal Rules of Civil Procedure, as are the modifications now requested. As discussed above, the changed circumstances cited by plaintiffs do not justify relief under Rule 60(b).

C. Lack of Notice

In their reply brief, plaintiffs also raise for the first time the argument that a court presiding over a class action has the authority to deal with matters of notice to class members and to remedy lack of notice in individual cases. *See* Plaintiffs' Reply at 11-14. Plaintiffs appear to be offering this argument to augment their arguments for relief both under Rule 60(b) and under the Court's inherent equitable authority. They urge the Court to adopt the "excusable neglect" standard in determining whether to direct the Facilitator to consider the late-filed petitions for Monitor review as timely.

The Court notes as a threshold matter that all of the cases cited by plaintiffs involved claimants who were seeking either to file claims or opt-out requests out of time. *See* Plaintiffs' Reply at 11-14. In the instant case, all of the claimants had the opportunity to participate in the adjudicatory processes established by the Consent Decree and had their claims denied. By failing to meet the deadlines established by the Stipulation and Order, they have lost only their opportunity to petition for Monitor review of those adverse decisions.

Under Rule 6(b) of the Federal Rules of Civil Procedure, a district court may for cause shown "in its discretion" enlarge the time within which an act required by an order of the court

must be completed "where the failure to act was the result of excusable neglect." FED. R. CIV. P. 6(b); *see also In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003).[5] Assuming that the "excusable neglect" standard would otherwise be applicable in this case, that standard has not been met. The factors involved in determining whether certain neglect was "excusable" include: the danger of prejudice to the non-movant; the length of the delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. *See In re Pioneer Investment Services Co.*, 507 U. S. 380, 395 (1993); *see also In re Vitamins Antitrust Litigation*, 327 F.3d at 1209. As this Court found quite explicitly in its earlier Opinion, "defendant will 'be prejudiced to the tune of almost one million dollars' if the Court permits consideration of the late petitions and if even five percent of them are successful." *Pigford v. Veneman*, 265 F. Supp. 2d at 50. Because this is not a case in which there is a limited settlement fund, the granting of relief to plaintiffs would necessarily result in actual prejudice to the defendant. Similarly, because the deadlines were negotiated and agreed to by plaintiffs, it logically follows that the resulting failure to meet those deadlines had been within the reasonable control of plaintiffs. The Court therefore finds that the standard for excusable neglect is not met and that plaintiffs' request for relief must be denied.

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[5] Defendants argue that the rationale of the cases cited by plaintiff is inapposite because the deadlines at issue in the instant case were not merely determined by the district court, but rather were the result of negotiations between the parties and therefore the deadlines in the Stipulation and Order have legal significance because they are the result of a contract. Surreply at 7. Because the Court finds that the standard for excusable neglect is not met, it does not address whether the standard is applicable.

An Order consistent with this Opinion will issue this same day.

SO ORDERED.

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PAUL L. FRIEDMAN
United States District Judge

DATE:

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed June 2, 2003]

Civil Action No. 97-1978 (PLF)

TIMOTHY PIGFORD, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary,
United States Department of Agriculture,
Defendant.

Civil Action No. 98-1693 (PLF)

CECIL BREWINGTON, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary,
United States Department of Agriculture,
Defendant.

OPINION AND ORDER

The Court has before it plaintiffs' motion for relief for four groups of claimants who filed petitions for Monitor review, as well as defendant's opposition and plaintiffs' reply.[1]

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[1] Plaintiffs initially brought this issue before the Court in their December 11, 2001 "Motion for Relief on Behalf of 97 Class Members Whose Petitions for Monitor Review Were Filed on or Before September 15, 2001, but Have Been Designated by the Facilitator as Late" (under seal) (hereinafter "Pl. December 11, 2001 Motion"). Because plaintiffs subse-

Plaintiffs seek relief for a total of 350 individual claimants whose petitions for Monitor review were deemed untimely by the Facilitator and not forwarded to the Monitor for consideration, based on the Facilitator's determination that either the petition or an amendment to the petition was untimely filed.[2] Relying on Rule 60(b) of the Federal Rules of Civil Procedure and the Court's inherent equitable authority, plaintiffs ask the Court to order that these petitions be processed for consideration by the Monitor. For the reasons stated below, the Court denies plaintiffs' motion.

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quently learned that additional late petitions were at issue, plaintiffs withdrew their first motion and ultimately filed the instant motion for relief on July 19, 2002. *See* Plaintiffs' Motion for Relief for Four Groups of Claimants Who Filed Petitions for Monitor Review at 2 ("Pl. Motion"). Among the claimants included in plaintiff's December 11, 2001 motion and not included in the instant motion are approximately 10 whose deadlines were missed as a result of confusion caused by Facilitator error. Specifically, when printing duplicate copies of Adjudicator decisions for farmers or their attorneys, the Facilitator mistakenly marked the decisions with the date on which they were printed, rather than the date on which the decision originally issued, thus misleading the claimant or attorney in his or her calculation of the petition deadline. *See* Pl. December 11, 2001 Motion at 11. Based on the government's agreement to allow these petitions to be processed as timely, the Court considers this issue to be conceded by the government and considers the concession applicable to any and all claimants whose deadlines were missed for the same reason.

[2] In the instant motion, plaintiffs originally sought relief for a total of 387 claimants. In subsequent briefing, however, the parties reached an agreement with respect to 37 of these claimants, reducing the total to 350 claimants. *See* Defendant's Opposition to Plaintiffs' Motion for Relief for Four Groups of Claimants Who Filed Petitions for Monitor Review at 9 ("Def. Opp."); Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Relief for Four Groups of Claimants Who Filed Petitions for Monitor Review at 2-3 ("Pl. Reply").

I. BACKGROUND

A. Petitions for Monitor Review

By Stipulation and Order of July 14, 2000, the parties agreed to deadlines for the submission of all petitions for Monitor review of Track A Adjudicator decisions, and the Court endorsed this agreement.[3] Under that Stipulation and Order, for claimants who received a decision before July 14, 2000 the deadline for filing a petition was 120 days from the date of the Order, that is November 13, 2000. For those claimants who received an Adjudicator decision after July 14, 2000, the deadline was 120 days after the date of the decision. *See* Stipulation and Order of July 14, 2000 at ¶5 ("Stip. and Order").

Subsequent to the entry of these deadlines, the Court issued a series of orders that created a "Register" process, through which plaintiffs' counsel provided the government with the names of all those claimants to whom the November 13, 2000 deadline applied and on whose behalf they intended to file petitions. For reasons explained in these subsequent Orders, the Court effectively extended the November 13, 2000 deadline for the filing of petitions to May 15, 2001 and subsequently to September 15, 2001. The Court, however, did not alter the deadlines to petition for Monitor review for claimants who received an Adjudicator decision after July 14, 2000 or for those who had received a decision before July 14, 2000 but whose names had not been placed on the Register. *See* Order of November 8, 2000; Memorandum Opinion and Order of May 15, 2001; *see also* Monitor's Report on Late Petition Filings, February 28, 2002 at 3 ("Monitor Report"). Accordingly, most claimant petitions for Monitor review were due on September 15, 2001, and the vast majority of

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[3] Although the Stipulation and Order applied to both Track A (Adjudicator) and Track B (Arbitrator) decisions, plaintiffs' motion and this Opinion deal only with the former.

these were timely filed. *See* Monitor Report at ¶5; Pl. Motion at 3. Of the thousands of petitions that were filed on behalf of claimants, both pursuant to the Register and otherwise, plaintiffs' motion pertains to the 350 petitions (less than 1.8% of all Track A claimants) that currently are not being processed for consideration. *See* Pl. Reply at 3.

B. Plaintiffs' Motion for Relief

Plaintiffs address their motion to four groups of claimants, describing the specific circumstances that justify relief for each group. Although plaintiffs further divide these groups into subcategories and provide individual detail with respect to each of the 350 affected claimants, the motion is devoted primarily to two circumstances that plaintiffs suggest justify relief: (1) mistakes made by class counsel, of counsel, *pro Bono* counsel or unaffiliated attorneys, largely owing to the high volume of petitions and/or the short period of time within which class counsel had to compile the initial Register; and (2) inadequate notice to *pro se* farmers and unaffiliated attorneys regarding the 120-day deadline for petitions for Monitor review.[4] With an eye to these two circumstances, the Court turns to the question of legal support for the requested relief.

II. DISCUSSION

A. Sources of Authority

Plaintiffs argue that the Court has authority to direct the Facilitator to process the 350 petitions for Monitor review despite the Facilitator's determination that either the petition or a supplement to the petition was untimely filed. In support of this position, plaintiffs rely on Rule 60(b) of the Federal Rules of Civil Procedure, which permits a court to interpret and modify its orders, and on the Court's inherent equitable authority to modify its decrees.

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[4] To the extent that certain claimants included in plaintiffs' motion do not fit into either of these categories, the Court will address those circumstances and arguments for relief separately.

With respect to the first ground, plaintiffs argue that because the petition deadlines were established by the Court's Stipulation and Order of July 14, 2000 and effectively extended by its Orders of November 8, 2000 and May 13, 2001, Rule 60(b) gives the Court discretion to "interpret" its prior orders so as to deem these 350 petitions timely. *See* Pl. Motion at 33. Alternatively, plaintiffs suggest that the Court may modify its prior orders under Rule 60(b) to allow at least some of the petitions at issue to be treated as exceptions to the deadlines. *See id.*

With respect to the Court's inherent equitable authority, plaintiffs argue that it is "in the interests of justice to designate these petitions as timely filed," based on "unforeseeable errors" made by the Facilitator, attorneys and possibly the Monitor, as well as "inevitable" logistical problems resulting from the "practical realities" of representing so many claimants in the petition process. *See* Pl. Motion at 34-36. In essence, plaintiffs ask the Court to set aside the framework of deadlines established by the parties' stipulation and the Court's prior orders "in recognition of the inequity that will result" and the extreme hardship that claimants will suffer if the deadlines that have been established now are enforced. *See id.* at 35-36.

Defendant opposes plaintiffs' motion on the grounds that the requested relief can be achieved only through modification of the Court's prior orders and that such modification is not justified in these circumstances. Specifically, defendant argues that plaintiffs have not satisfied the legal standard for modification and that the Court therefore lacks authority to order that these petitions be processed for consideration. As for the Court's inherent equitable authority, defendant argues that the standard is essentially the same regardless of whether the Court analyzes the question under Rule 60(b) of the Federal Rules of Civil Procedure or under general equitable principles. *See* Def. Opp. at 6.

Upon review of the parties' arguments, the relevant law and the entire record in this case, the Court concludes as a threshold matter that the requested relief cannot be granted without modification of the Court's previous orders; to declare these petitions timely cannot reasonably be seen as mere "interpretation." The Court therefore turns to the legal standard for modification, as expressed in Rule 60(b) itself and the applicable case law.

B. Legal Standard for Modification

Rule 60(b) of the Federal Rules of Civil Procedure provides that "upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [where] . . . it is no longer equitable that the judgment should have prospective application; or . . . [for] any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). To demonstrate that it is "no longer equitable" under Rule 60(b)(5) for the petition deadlines to be given effect, plaintiffs have the burden of identifying a "significant change in circumstances" that justifies modification. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992). Such changed circumstances may include "unforeseen obstacles" that make a decree or order "unworkable." *Id.* at 384; *see also Pigford v. Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002); *Pigford v. Glickman*, 127 F.Supp.2d 35, 38 (D.D.C. 2001). Moreover, Rule 60(b)(5) "is not to be read without emphasis on the important words 'no longer'; assuming that the propriety of the injunction as issued has passed beyond debate, it refers to some change in conditions that makes continued enforcement inequitable." *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 583, n.44 (D.C. Cir. 1980) (quoting *Schildhaus v. Moe*, 335 F.2d 529, 530 (2nd Cir. 1964)). Similarly, to justify modification of an order under a court's general equitable authority, a party also must demonstrate a "significant change in the circumstances obtaining at the time the [order] was entered." *Environmental*

Defense Fund, Inc. v. Costle, 636 F.2d 1229, 1240 (D.C. Cir. 1980).

Upon close consideration of the specific circumstances described in plaintiffs' motion and attached exhibits, the Court concludes that modification of its prior orders is not justified. With respect to each of plaintiffs' two main arguments for relief—the high volume of petitions and inadequate notice of deadlines—the Court finds that the facts presented do not constitute "changed circumstances" sufficient to justify modification of the Court's prior orders either under Rule 60(b) or under the Court's equitable authority. With respect to the unique circumstances of certain individuals falling outside these two main categories, the Court also finds that modification is not justified.

C. Changed Circumstances

Plaintiffs present two main theories of changed circumstances in support of their request for modification: (1) attorney error resulting from the high volume of petitions; and (2) inadequate notice of the 120-day deadline. The Court examines each theory under the standard articulated above.

1. Attorney Errors Due to High Volume

For approximately 114 of the late petitions at issue—including most in Group One, who filed untimely petitions, and most in Group Four, who filed timely petitions but untimely supplements—plaintiffs admit that the lateness resulted from attorney error. *See* Pl. Motion at 6, 26.[5] Notwithstanding this

[5] Plaintiffs suggest that in 13 of the cases in Group Four, the untimely submissions were intended as supplements to timely petitions and that some claimants and attorneys understood such supplements to be permissible. *See* Pl. Motion at 26. In support, plaintiffs note that supplements to timely petitions are not discussed in the Consent Decree and attach the statement of one attorney who submitted four such late supplements based on her understanding that the Monitor's Office would accept late supplements under certain conditions. *See* Pl. Motion, Exhibit H, Statement

admission, plaintiffs argue that the attorney error was an unavoidable result of the large volume of claimants requesting assistance with petitions during a short period of time. *See* Pl. Motion at 35. Because the number of petitioners in this case increased so far beyond original estimates, plaintiffs reason, attorney errors in the petition process were not "careless" but rather an inevitable byproduct of lawyers having to handle so many cases under a system set up with far fewer participants in mind. *See* Pl. Reply at 4-5, 7, 10. Plaintiffs assert that this explosion in volume is "[t]he predominant change in circumstance" that justifies modification of the Court's prior orders. *Id.* at 5.

The fundamental flaw in this reasoning is that the critical "changed circumstance" on which plaintiffs rely occurred *before*, not after, the relevant deadlines were agreed to by the parties and endorsed by the Court. The exponential increase in claimants was fully apparent when plaintiffs and defendant negotiated and agreed to the July 14, 2000 Stipulation and Order, including its clear provision that "no extensions of these deadlines will be granted for any reason." Stip. and Order at ¶4. Plaintiffs' burden in assisting thousands of claimants while adhering to these negotiated deadlines thus was entirely foreseeable and does not constitute a change in circumstance. Accordingly, the Court must find that plaintiffs

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of Diane Cooley. Despite Ms. Cooley's statements, the Court agrees with defendant that claimants and their attorneys "could not legitimately have been confused about whether supplemental filings would be accepted." Def. Opp. at 10. The possibility of late supplements to timely petitions was expressly rejected by the Court in a prior order, on the ground that to allow such filings would permit "an indefinite extension of time so that [class counsel] can complete what should have been complete six months ago." Memorandum Opinion and Order of April 27, 2001 at 4; *see also* Office of the Monitor, *Questions and Answers About Monitor Review of Decisions*, at Q.14, available at: www.pigfordmonitor.org/class/200206qa.htm (June 2002) ("No Petitions or additional Petition information can be submitted after your deadline has passed.").

have failed to carry their burden of demonstrating that the factual circumstances have changed in a way that would justify a modification of the July 14 Stipulation and Order. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. at 383-84 (ordinarily modification should not be granted where the moving party relies upon events that were actually known or anticipated at the time of the original order); *see also Laffey v. Northwest Airlines, Inc.*, 642 F.2d at 583, n.44.[6]

2. Inadequate Notice

The majority of late petitions at issue—208 of the 350, according to plaintiffs' motion—were late not because of error by class counsel, of counsel or *pro bono* counsel but because claimants or their unaffiliated attorneys received inadequate notice of the 120-day deadline. *See* Pl. Reply at 9. Specifically, plaintiffs claim that the decision letters mailed to claimants after July 14, 2000 "mistakenly omitted language informing claimants that they had 120 days from the date of the decision to petition the Monitor for review." Pl. Motion at 14-15. Plaintiffs characterize this omission as "an honest mistake" resulting from miscommunications among the parties, Pl. Reply at 9, and explain that "[biased on the July 14, 2000 Stipulation and Order, by July 27, 2000, the parties, Facilitator, and Arbitrator had agreed upon modified language for Track A and Track B decisions." Pl. Motion at 15, n.5. Defendant objects to this characterization, asserting that "neither the parties nor the Facilitator ever intended to include such language [regarding the 120-day deadline] in adverse decision letters" but only in letters informing claimants of favorable decisions. Def. Opp. at 8. Moreover, defendant

[6] With respect to those claimants who filed timely petitions but whose files contain additional documents that were untimely filed (all but one of the claimants included in Group Four of plaintiffs' motion), the Facilitator should forward all timely-filed portions of the files to the Monitor since these portions are properly eligible for Monitor consideration, while all portions deemed untimely by the Facilitator should not be forwarded.

notes that the Stipulation and Order itself did not require any language regarding the deadline to be included in letters to claimants. Because this form of notice was not contemplated by the Court or the parties at the time that the deadlines were established by Stipulation and Court Order, defendant argues, the fact that such notice was not given does not constitute changed circumstances. *See id.*

Although it is unclear from the record precisely what reference to the deadline, if any, the parties intended to include in decision letters, the Court concludes that the actual omission of such notice to many claimants does not justify modification of the Court's prior orders. Whatever the reasons for the omission of language regarding the deadline from decision letters, it is evident that the July 14 Stipulation and Order establishing the 120-day deadline did not require such language. *See* Stip. and Order at ¶¶ 5, 7. The Stipulation and Order required two forms of notice: "Copies of this Stipulation and Order shall be (a) posted in a conspicuous public place in every USDA Farm Services Agency county office; and (b) mailed by the Facilitator to every person who (i) requested a Claim Sheet and Election Form and (ii) did not submit a completed Claim Form to the Facilitator within the period prescribed by ¶ 5(c) of the Consent Decree." Stip. and Order at ¶ 7.[7] At the time that the Stipulation and Order was entered, therefore, it was clear to both parties and to the Court that the Order did not require individual notice to unsuccessful Track A claimants. *See id.*; Monitor's Notice Report at 3; *see also United States v. Western Electric Co.*,

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[7] This mailing of the Stipulation and Order thus targeted people who were likely to be affected by provisions of the Order other than the 120-day deadline. *See* Monitor's Report to the Court Regarding Notice to the Class of the 120-Day Deadline to File a Petition For Monitor Review, May 30, 2003 at 3 ("Monitor's Notice Report") . As the Monitor has noted, "few people eligible to file a petition with the Monitor would have received direct notice of the 120-day deadline from this mailing." *Id.*

Inc., 154 F.R.D. 1, 7, n.16 (D.D.C. 1994), *aff'd*, 46 F.3d 1198 (D.C. Cir. 1995) ("[T]he scope of a consent decree [or stipulated court order] must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it . . . . [T]he instrument must be construed as it is written, and not as it might have been written." (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). Accordingly, the absence of individual notice does not create a situation where "changed factual conditions make compliance with the [order] substantially more onerous." *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. at 384. For those reasons, the Court cannot grant the requested relief on this ground.

3. Unique Circumstances

Finally, plaintiffs assert that the Court should grant relief to 13 claimants who present unique circumstances. Plaintiffs' argument fails with respect to these claimants as well.

The first group described by plaintiffs as presenting "special circumstances" is the Carpenter family. Within this group of claimants are five individuals and a farming business, all of whom requested assistance from class counsel in filing petitions for Monitor review but only one of whom was included on the Register. *See* Pl. Motion at 6. Upon review of the information in plaintiffs' motion and attached exhibits relating to each of the Carpenter claimants, the Court finds that the circumstances surrounding these late petitions are not "unique" but the same as those surrounding the claimants in Group One of plaintiffs' motion—namely, attorney error. As stated in plaintiffs' exhibits, the situation underlying each of the Carpenters' requests for relief is simple: "This claim was eligible for the Register but was mistakenly omitted." *See* Pl. Motion, Exh. D, Nos. 92-96 (under seal).While plaintiffs attribute the omission of five out of the six Carpenter claimants to a cause other than the high volume of petitions—the fact that all correspondence relating to the claim of any Carpenter

was faxed to class counsel under a uniform cover sheet from Carpenter's Produce, which class counsel mistook for correspondence from only one member of the family, whose name was the only one placed on the Register—the omission reflects a circumstance presented by many other claimants in plaintiffs' motion: attorney error. Accordingly, the Court's preceding analysis of petitions untimely filed as a result of attorney error applies to the Carpenters' petitions as well, and the request for relief on their behalf is denied. *See* supra § II.C.1.

Plaintiffs also seek relief on behalf of six claimants who did not submit petitions for Monitor review but submitted letters requesting Monitor assistance, which the Facilitator treated as petitions for Monitor review. *See* Pl. Motion at 6, 22-23, 25. While there are no deadlines that apply to requests for Monitor assistance, the Facilitator treated these letters as petitions and thus deemed them untimely because they were filed beyond the 120-day deadline. Plaintiffs seek relief for these claimants "in the event that the Court determines that [the letters are] more appropriately considered by the Monitor as petition[s]." Pl. Motion at 22-23. Plaintiffs' motion is not entirely clear as to what relief is sought for these claimants, but it appears that plaintiffs are asking the Court *either* to reverse the Facilitator's decision to designate these letters as petitions for Monitor review and permit them to be forwarded to the Monitor for her assistance *or* to uphold the designation of the submissions as late petitions but nonetheless allow them to be processed as petitions for Monitor review in spite of their untimely filing.

In view of the foregoing discussion, the Court will not disturb the Facilitator's determination that these letters should not be forwarded to the Monitor as petitions for Monitor review. If these requests for assistance concern matters properly outside of the Monitor's petition process, however, the letters should be forwarded to the Monitor for her resolution, pursu-

ant to her authority under Paragraph 12(b)(ii) of the Consent Decree. Moreover, claimants may seek assistance on such matters directly from the Monitor's Office at any time, using the process outlined in the Order of Reference and detailed on the Monitor's website: www.pigfordmonitor.org. To the extent that plaintiffs ask the Court to grant relief for these six claimants by modifying the prior orders that established the relevant deadlines, the Court finds no basis for such modification, as explained above. *See supra* § II.C.

Another unique circumstance presented in plaintiffs' motion is the case of one claimant whose submission was not a petition for Monitor review but a request for reconsideration of the Monitor's prior decision to deny his petition for Monitor review. *See* Pl. Motion at § II.D.3(a)(5). It is unclear from the record why the Facilitator designated this submission as a late petition, given the fact that claimants are allowed only one lifetime petition for Monitor review and this claimant already had filed one. *See* Stip. and Order at ¶ 6. Moreover, the Monitor has implemented a process for reconsideration of her decisions on petitions for Monitor review. *See* www.pigfordmonitor.org/reconpol.htm. This claimant's submission appears to be a request for such reconsideration. In light of the Monitor's established process for reconsideration, and the fact that this submission could not be a late petition, the Facilitator should redesignate this submission and forward it to the Monitor. Alternatively, the claimant may wish to submit the request for reconsideration of the Monitor's prior decision directly to the Office of the Monitor. The Court is not the appropriate authority for reviewing the Facilitator's decision.

Finally, plaintiffs seek relief for one claimant who was incarcerated at the time that the 120-day deadline passed. *See* Pl. Motion at 6. In support of relief for this claimant, plaintiffs rely on D.C. Code Section 12-302(a)(3), which provides that the applicable limitations period for filing civil

actions is tolled during an individual's incarceration. *See Proctor v. Morrissey*, 979 F.Supp. 29, 32 (D.D.C. 1997) (citing *Brown v. Jonz*, 572 A.2d 455, 457, n.7 (D.C. 1990)). It is unclear from the record precisely when this claimant's incarceration began and ended, and it therefore is unclear whether this petition would be timely if viewed in light of that circumstance. This claimant may wish to seek reconsideration from the Facilitator itself, which may reverse its decision in light of the alleged incarceration, the relevant case law and the potential tolling of the 120-day deadline.

D. Consent Decree, Prejudice to Defendant and Waiver

In addition to the argument that changed circumstances justify the requested relief, plaintiffs present several other rationales in support of their motion. First, plaintiffs argue that the requested relief is consistent with and supported by the remedial purposes of the Consent Decree, which, they assert, apply equally to these petitions because the Consent Decree was the basis for the Court's Stipulation and Order of July 14, 2000 and its subsequent orders. *See* Pl. Motion at 36-38; Pl. Reply at 11. The Court cannot agree. While plaintiffs are correct that "without the Consent Decree, the petition process does not exist," Pl. Reply at 11, this statement gets them nowhere. It is precisely because the Consent Decree did *not* contain deadlines for petitions for Monitor review that the parties negotiated the July 14, 2000 Stipulation and Order and the Court endorsed the agreement of the parties. It therefore is implausible to read the July 14 Order as somehow flowing from and subject to the interpretive principles of the Consent Decree. Certainly the Consent Decree's remedial purpose cannot justify modification of the Court's subsequent orders where such modification is otherwise impermissible.

Plaintiffs next suggest that the Court should grant the requested relief because the defendant will not be substantially prejudiced. The Court finds this argument equally unavailing. It is beyond question that further financial obli-

gation would constitute prejudice to defendant, and that is precisely what plaintiffs seek through their motion. As the parties point out, the government already has paid out over $800 million as a result of this settlement, Pl. Reply at 2, and defendant will "be prejudiced to the tune of almost one million dollars" if the Court permits consideration of the late petitions and if even five percent of them are successful. Def. Opp. at 11. Accordingly, the Court perceives no absence of prejudice to support plaintiffs' motion.

Plaintiffs also argue that defendant has waived her right to object to plaintiffs' motion because she has "repeatedly avoided strict application of the petition deadlines throughout this petition process." Pl. Motion at 38. As examples of the extensions that constitute defendant's waiver, plaintiffs cite repeated requests by defendant that the Facilitator either slow or delay the routing of petitions to defendant for response, as well as defendant's request to the Court for an extension of time to respond to a number of petitions in May and June of 2002. *See id.* at 39. Plaintiffs also assert that defendant filed a number of petitions for Monitor review out of time and will have to seek relief from the Court, but provide no further specifics on this claim.

The Court concludes that defendant has not waived the right to object to plaintiffs' motion. In contrast to plaintiffs' request for relief, defendant's repeated requests of the Facilitator did not require the modification of any Court order. Neither the July 14, 2000 Stipulation and Order nor the September 12, 2000 Stipulation and Order (which extended the time for party responses to petitions to 60 days and set a maximum of 125 petitions per week to be routed by the Facilitator to the Monitor and to the parties) provided a minimum number of petitions that must be routed to defendant each week. Furthermore, defendant's requests that this Court extend the time for response to already routed petitions in May and June of 2002 arose from an incident of

mass flooding at defendant's offices that destroyed several computers. *See* Def. Opp. at 14. Such an unforeseeable disaster is qualitatively different from the circumstances described by plaintiff and thus does not constitute a waiver of defendant's right to object.

In sum, plaintiffs ask the Court to modify its prior orders to allow the processing of 350 petitions deemed late by the Facilitator. Upon close review of the parties' arguments and the record, the Court concludes that plaintiffs have failed to demonstrate changed circumstances sufficient to justify modification either under Rule 60(b) of the Federal Rules of Civil Procedure or under the Court's inherent equitable powers. Accordingly, it is hereby

ORDERED that plaintiffs' motion for relief [639] is DENIED with respect to all 350 claimants.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

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APPENDIX G

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Nos. 02–5052 & 02–5053.

TIMOTHY C. PIGFORD, *et al.*,
Appellees,

v.

ANN M. VENEMAN, Secretary,
United States Department of Agriculture,
Appellant.

Argued May 1, 2002
Decided June 21, 2002

Before: SENTELLE, RANDOLPH and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge:*

The question presented in this appeal concerns a district court's authority to interpret or modify a consent decree—here, the settlement of a class action brought by over 20,000 African–American farmers charging the United States Department of Agriculture with racial discrimination in lending practices. Due to class counsel's failure—"bordering on legal malpractice," the district court called it—to meet critical consent decree deadlines, the district court interpreted the decree to allow extension of such deadlines so long as justice requires." Although we find that the district court exceeded its interpretive authority under the decree, we hold that class

counsel's conduct justifies modifying the decree under Federal Rule of Civil Procedure 60(b)(5). But because the order does not satisfy the "tailor[ing]" requirement for a Rule 60(b)(5) modification, *see Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383, 112 S.Ct. 748, 760, 116 L.Ed.2d 867 (1992), we reverse and remand for further proceedings.

I.

Proceeding under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f, three African–American farmers filed this class action against the United States Department of Agriculture alleging racial discrimination in the administration of federally funded credit and benefit programs. The class ultimately included 22,000 similarly situated farmers from fifteen states. Shortly before the farmers filed suit, the Department released a report commissioned by then–Secretary Dan Glickman "to address [the agency's] long-standing civil rights problems," documented since the 1960s by numerous federal government "[s]tudies, reports, and task forces." CIVIL RIGHTS ACTION TEAM, USDA, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 2–3 (1997), *available at* http://www.usda.gov/news/civil/cmext.htm. Examining the "painful history" of its dealings with African–American farmers, the Department concluded that local credit and loan agencies responsible for administering Department programs often discriminated against the farmers. *Id.* at 6. According to the Glickman report, Department officials had "effectively dismantled" the Office for Civil Rights Enforcement—the very office charged with addressing discrimination complaints. *Id.* at 47–48 (internal quotation marks and citation omitted). "[O]ften mak[ing] matters worse," the "complaints processing system" was a "bureaucratic nightmare" that "processed [complaints] slowly, if at all," resulting in a huge "backlog," while at the same time the agency "proceed-[ed] with farm foreclosures—even where discrimination may

have contributed to the farmers' plight." *Id.* at 22–25. "Minority farmers," the report concluded, "lost significant amounts of land and potential farm income as a result of discrimination by [USDA] programs." *Id.* at 30.

After Congress intervened to preserve the farmers' claims by tolling the Equal Credit Opportunity Act's two-year statute of limitations, *see Pigford v. Glickman*, 185 F.R.D. 82, 88–89 (D.D.C.1999) (citing 15 U.S.C. § 1691e(f)), the parties entered into a consent decree. Designed to "ensur[e] that in their dealings with USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons," the decree establishes procedures for resolving class members' individual claims. Consent Decree at 2. Specifically, the decree allows class members to choose between two claims procedures, known as Tracks A and B. In recognition of the fact that "most . . . [class] members . . . had little in the way of documentation or proof" of either discriminatory treatment or damages suffered, Track A awards $50,000 to those farmers able to "meet only a minimal burden of proof." *Pigford*, 185 F.R.D. at 103. Track B—the mechanism at issue here—imposes no cap on damages, but requires farmers who choose this track, after limited discovery consisting "essentially [of] an exchange of lists of witnesses and exhibits and depositions of the opposing side's witnesses," to prove their claims by a preponderance of the evidence in one-day mini-trials before an arbitrator. *Id.* at 106. Set forth in paragraph 10 of the decree, Track B establishes strict time frames: the arbitrator sends a hearing notice within 10 days of receiving a Track B claim and holds a hearing no more than 150 days later; at least 90 days before the hearing, the Department and claimant file and serve on each other witness lists, summaries of direct testimony, and copies of all exhibits; discovery ends no later than 45 days before the hearing; and no fewer than 21 days before the hearing, both sides list witnesses they intend to crossexamine and file summaries of all legal and factual issues. Consent Decree ¶ 10(a)–

(e). Track A and B decisions are final, except that the losing side may petition for review by a court-appointed monitor. Id. ¶¶ 9(a)(v), 9(b)(v), 10(i), 12(b)(iii).

Following notice to the class and a hearing, the district court approved the consent decree as "fair, adequate, and reasonable," pursuant to Federal Rule of Civil Procedure 23. *Pigford*, 185 F.R.D. at 113. According to the district court, the decree represents an "historical first step toward righting the wrongs visited upon thousands of African–American farmers for decades by the [USDA]." *Pigford v. Glickman*, 127 F.Supp.2d 35, 40 (D.D.C. 2001). Our opinion affirming the district court's approval of the decree noted its importance for both the farmers and the government: the "United States is likely to provide an estimated $2 billion in debt relief and monetary payments in consideration for the dismissal of the class'[s] complaint." *Pigford v. Glickman*, 206 F.3d 1212, 1214 (D.C.Cir.2000). Ultimately, 21, -546 claims were accepted for review—21, -358 under Track A and 188 under Track B.

The decree provided for class counsel to receive an advance payment of $1 million in fees to cover decree "implementation." Consent Decree ¶ 14(b). The decree entitled counsel to seek additional fees under the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d), for their work in connection with filing the action and implementing the decree, Consent Decree ¶ 14(a). One year into the implementation process, the district court "took the extraordinary step of awarding a second advance"—this time for $7 million. Order of the United States District Court for the District of Columbia at 2 (Mar. 8, 2001) (No. 97cv01978). The Department and class counsel eventually settled all fee claims for $14.9 million. Attorneys and firms sharing the fees were: Alexander J. Pires, Jr., of Conlon, Frantz, Phelan, Pires & Leavy; Philip L. Fracas, of Tattle, Tabor & Heron; JB. Chestnut, of Chestnut, Sanders, Sanders & Pettily; T. Roe Framer, of Langshan, Frazer, Sweet &

Freese; Hubbard Saunders IV, of The Terney Firm; Othello Cross, of Cross, Kearney & McKissic; Gerard Lear, of Speiser Krause; and William J. Smith.

Several months after class counsel received their second fee advance and just two weeks prior to the deadline for filing petitions for monitor review for the "vast majority of claimants [in both tracks]," class counsel filed an emergency motion seeking an extension of time. Order of the United States District Court for the District of Columbia at 2 (Nov. 8, 2000) (No. 97cv01978). Counsel revealed that they had filed only a small fraction of the total petitions requested by the farmers. Concerned that "counsel's failings . . . not be visited on their clients," *id.* at 3, and relying on "explicit assurances" by counsel as to the work load they could realistically shoulder into the future, *Pigford v. Veneman*, 141 F.Supp.2d 60, 62 (D.D.C.2001), the district court permitted counsel to file pro forma petitions by the original deadline and then to either file supporting materials or to withdraw the petitions at the rate of at least 400 petitions per month, *see* Order of the United States District Court for the District of Columbia at 5–6 (Nov. 8, 2000) (No. 97cv01978).

A few months later, the district court observed "a very disturbing trend": class counsel had failed to meet their monthly quota "even once." *Pigford*, 141 F.Supp.2d at 62. Worse still, counsel had "drastically cut [their] staff, bring[ing] Class Counsel's ability to represent the [farmers] into serious question." *Id.* "[A]larmed by Class Counsel's consistent failure" to meet decree timelines, the district court noted counsel's "remarkable admission that they never had a realistic expectation of meeting" agreed-upon or court-ordered deadlines for the monitor review process. Order of the United States District Court for the District of Columbia at 2–3 (Apr. 27, 2001) (No. 97cv01978). The court described counsel's performance as "dismal"—"border[ing] on legal malpractice"—and "wonder[ed]" whether class counsel would have been in

such a predicament had they not filed "three new sister class actions" against the Department. *Id.* at 2–3 & nn. 1, 5.

The district court eventually imposed a series of escalating daily fines on class counsel for untimely monitor review filings. *Pigford v. Veneman*, 143 F.Supp.2d 28, 32 (D.D.C.2001). Instead of simply submitting materials in support of their clients' petitions in a more timely fashion, however, counsel drastically increased the rate at which they *withdrew* petitions for monitor review—from 19% to 48%—"once again" leading the district court to "question Class Counsel's fidelity to their clients." *Pigford v. Veneman*, 148 F.Supp.2d 31, 33 & n. 1 (D.D.C.2001).

Class counsel's failure to cope with their responsibilities extended to the Track B process. Consider the case of Earl Kitchen, a farmer from Arkansas who filed a Track B claim. Kitchen was initially represented by Jesse L. Kearney, a member of one of the firms sharing in the fee award, Cross, Kearney & McKissic. During the course of representing Kitchen, Kearney obtained extensions of several paragraph 10 deadlines either with consent or over the Department's objection. Around the time the Department agreed to pay class counsel $14.9 million, Kearney missed the deadline (already extended by mutual consent) to submit written direct testimony. Kearney's failure could have drastic consequences, for absent submission of testimony, Kitchen's claim will "be extinguished." Appellees' Br. at 12; see also Consent Decree ¶ 10(g) (putting the burden of proof on the claimant).

In the meantime, the district court, deeply concerned about the decree's viability, asked the American Bar Association Committee on Pro Bono and Public Services to "assemble a team of *pro bono* lawyers to assist Class Counsel on an emergency basis." Order of the United States District Court for the District of Columbia at 7 (Apr. 27, 2001) (No. 97cv01978). In response, lawyers from the Pro Bono Committee and the firms of Arnold & Porter and Crowell & Moring recruited

some of Washing[illegible]s largest law firms: Covington & Burling; Sidley, Aust[illegible]Brown & Wood; Steptoe & Johnson; Swidler, Berlin, Shereff & Friedman; and Wilmer, Cutler, and Pickering. The district court, recognizing the competing demands on class counsel arising out of their representation of multiple claimants in both tracks and at various stages of the claims resolution process, hoped that this added assistance would lift the "heavy burden of Track B litigation from the shoulders of Class Counsel," enabling them to "focus on the petition [for monitor review] process." *Pigford*, 143 F.Supp.2d at 30 n.1.

Pro bono counsel took over the representation of Earl Kitchen and asked the Department to extend the time for filing written direct testimony. The Department refused. As a result and because class counsel had apparently missed deadlines in other Track B cases, pro bono counsel filed a "motion to endow," asking the district court "to interpret (and if necessary, to modify) the Consent Decree, so that Arbitrators have discretion to extend deadlines when strict compliance with the original scheduling framework would defeat the Decree's overarching remedial purposes." Pls.' Mot. to Endow at 1. Granting the motion, the district court found it "implicit" in the Decree's terms that arbitrators have such discretion. *Pigford v. Veneman*, 182 F.Supp.2d 50, 53 (D.D.C.2002).

The Department appeals. At its request, we entered a stay pending appeal.

II.

District courts possess two types of authority over consent decrees. First, they may interpret and enforce a decree to the extent authorized either by the decree or by the related order. *See Bd. of Trustees of Hotel & Rest. Employees Local 25 v. Madison Hotel, Inc.*, 97 F.3d 1479, 1484 n. 8 (D.C.Cir.1996) (observing that a district court retains enforcement jurisdiction over a settlement if litigants so provide in their stipula-

tion of dismissal or the dismissal order incorporates the settlement terms). Second, they may modify a decree pursuant to Federal Rule of Civil Procedure 60(b)(5). *See Rufo*, 502 U.S. at 378–79, 112 S.Ct. at 757–58 (holding that the Rule 60(b)(5) standard for modifying judgments applies to consent decrees). These two sources of authority reflect a consent decree's hybrid character, having qualities of both contracts and court orders. *See id.* at 378, 112 S.Ct. at 757 (explaining that a consent decree "is contractual in nature" but also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree").

The farmers based their "motion to endow" on both sources of authority. In granting the motion, the district court explained that it was exercising its "authority to enforce and to interpret an approved Consent Decree." *Pigford*, 182 F.Supp.2d at 51. Although the court thus never addressed the question of its Rule 60(b)(5) authority, the farmers maintain that we may affirm the order on either ground. We consider each in turn.

Interpretation and Enforcement

Reasoning that the decree "explicitly allows for its construction in a liberal manner," and that paragraph 10 "delegate[s]" the district court's authority over Track B claims to arbitrators, the district court found it "implicit in the terms of the Consent Decree" that arbitrators "have essentially the same authority over Track B hearings that a trial judge would have over a trial or related pre-trial proceedings," including "discretion to allow for revision of certain deadlines, *even after the deadlines have passed*, so long as justice requires the revisions and provided that the burden on the defendant is not so great as to outweigh the interest of the claimant in fully presenting his or her claim." *Id.* at 51–53. The Department argues that the consent decree gives the district court no such authority. According to the Department, the district court's only authority either to interpret or enforce the consent decree

comes from paragraph 13, which "concern[s] . . . alleged violation[s] of any provision of th[e] . . . Decree," and directs "[t]he person seeking enforcement of a provision of th[e] . . . Decree" to attempt to resolve any problems without court intervention and then to seek enforcement through contempt proceedings. Consent Decree ¶ 13; *see also id.* ¶ 21 (retaining the court's authority to enforce the decree through contempt proceedings). Since the farmers neither alleged a violation nor invoked the procedures for "seeking enforcement," the Department contends that the district court lacked jurisdiction to consider the "motion to endow." Defending the district court's order and relying on our statement in *Beckett v. Air Line Pilots Ass'n* that it is a "well-established principle that a trial court retains jurisdiction to enforce its consent decrees," 995 F.2d 280, 286 (D.C.Cir.1993), the farmers argue that the order was "properly grounded on jurisdiction 'ancillary' to that explicitly conferred by paragraph 13," Appellees' Br. at 21. Pursuant to this "ancillary jurisdiction," the farmers contend, the district court properly "enforce[d]" the decree's "overarching remedial purposes." *Id.* at 20. The farmers also argue that quite apart from paragraph 13, the district court had "inherent" authority to interpret the decree. *Id.* at 21.

We agree with the Department. In *Kokkonen v. Guardian Life Insurance Co. of America*, the Supreme Court held that a district court lacked "ancillary jurisdiction" to enforce a consent decree because neither the decree nor the order dismissing the case expressly retained jurisdiction to do so. 511 U.S. 375, 380–81, 114 S.Ct. 1673, 1676–77, 128 L.Ed.2d 391 (1994). Although *Kokkonen* differs from the situation here—the consent decree in this case does retain certain enforcement jurisdiction—the decision teaches that district courts enjoy no free-ranging "ancillary" jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order. *See id.* at 381, 114 S.Ct. at 1677 (explaining that if the dismissal order had retained jurisdiction or incorporated the settlement, then "a breach of the

agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist"). Accordingly, an enforcement clause limited by its plain language, as is paragraph 13, to situations involving decree violations confers no ancillary jurisdiction to enforce the decree's "overarching . . . purposes." Indeed, when the district court approved the decree, it observed that the parties added the enforcement provision because the original version "appeared to prevent the Court from exercising jurisdiction in the event that the USDA did not comply with [its] terms," *Pigford*, 185 F.R.D. at 110, bolstering our view that the enforcement provision means what it says.

Beckett does not warrant a different result. Not only did the Beckett decree preserve the district court's "jurisdiction over [the] case to enforce the terms of [the] . . . decree," 995 F.2d at 286, but the party seeking enforcement in *Beckett*—unlike the farmers here—alleged that the other party had violated the decree's terms, *id.* at 281.

Equally unpersuasive is the farmers' argument that we need not worry about paragraph 13's limitations because the district court possesses "inherent" interpretive power over the decree "whether or not for explicit enforcement purposes." Appellees' Br. at 21. For one thing, we see no way the district court's interpretive authority can be unhinged from its enforcement authority. If the district court lacks paragraph 13 enforcement authority (because the farmers alleged no violation), then the farmers gain nothing from an interpretation that arbitrators may adjust paragraph 13 deadlines. Furthermore, none of the appellate cases cited by the farmers supports their assertion that "many cases . . . have recognized the 'inherent' jurisdiction of courts to interpret consent decrees," *id.*, apart from any enforcement power. Two of the cases involved decree modifications, not interpretations. *See Waste Mgmt. of Ohio, Inc. v. Dayton*, 132 F.3d 1142, 1146 & n. 4 (6th Cir.1997); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365

(5th Cir.1995). The third upheld, as a valid consent decree interpretation, a district court's imposition of interim deadlines not specified in the decree. *See Juan F. By and Through Lynch v. Weicker*, 37 F.3d 874 (2d Cir.1994). The order in that case, however—unlike the one here—provided for court intervention "when plaintiffs showed the defendant was 'likely' to be in noncompliance"; the additional deadlines represented a permissible interpretation because they served to "ensur[e] compliance." *Id.* at 879.

Our conclusion that the district court's interpretive and enforcement authority depends on the terms of the decree and related court order, rather than on some "ancillary" or "inherent" power, comports with a consent decree's contractual character. *See Rufo*, 502 U.S. at 378, 112 S.Ct. at 757. In this case, for example, the farmers and the Department bargained over Track B's time frames. Track B's "abbreviated and unambiguous deadlines," the Department candidly tells us, serve its interests by "limit[ing] the number of class members who . . . opt for the Track B process and . . . enhanc[ing] the government's ability to defend against [those] claims." Appellant's Br. at 24–25. The parties also bargained over paragraph 13, agreeing to limit district court enforcement authority to situations where the decree is violated. To hold now that the district court, through either some "ancillary" authority to enforce the decree absent a violation or some "inherent" authority to interpret it, may permit extensions of Track B deadlines would not only deny the Department the benefit of its bargain, but would also discourage settlements. Who would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?

Modification

The farmers argue that even if the district court lacked authority to interpret the decree to allow extension of Track B deadlines, we may still affirm the order as a proper modifica-

tion pursuant to Rule 60(b)(5). This rule permits courts, "upon such terms as are just," to "relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . [if] it is no longer equitable that the judgment should have prospective application.'" "[A] significant change in circumstances," the Supreme Court has held, may "warrant[ ] revision of [a] decree." *Rufo*, 502 U.S. at 383, 112 S.Ct. at 760. Such changed circumstances include "unforeseen obstacles" that make a decree "unworkable." *Id.* at 384, 112 S.Ct. at 760. Any modification must be "suitably tailored to the changed circumstances." *Id.* at 370, 112 S.Ct. at 753.

According to the farmers, two "significant change[d] . . . circumstances" make the consent decree "unworkable." They first point to a "dramatic and unexpected expansion in class size"—from 2000 (the number originally estimated) to 22,000 (the final number). Appellees' Br. at 31. As the Department points out, however, at the time the district court approved the decree, the parties realized the class already had between "15,000 and 20,000" members. *Pigford*, 185 F.R.D. at 94. Although this may well suggest that the actual increase was not "significant" enough to justify modification, we decline to resolve that issue, for the district court did not rely on the larger class size as a basis for the order at issue here.

Class counsel's "inability to represent all Track B claimants adequately," *Pigford*, 182 F.Supp.2d at 52, the farmers next argue, also provides a basis for a Rule 60(b)(5) modification. The Department concedes not only that counsel for "Kitchen and a number of other class members" committed "what appears to be malpractice," but also that this represents a "relevant new fact." Appellant's Br. at 28. Even so, the Department insists, the farmers' remedy is not to deny the Department the benefit of its bargained-for Track B deadlines, but rather to sue class counsel for malpractice. "'[C]lients must be held accountable for the acts and omissions of their attorneys.' "*Id.* at 29 (quoting *Pioneer Inv. Servs. Co. v.*

Brunswick Assocs., 507 U.S. 380, 396–97, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993)).

As a general matter, the Department is correct. In *Link v. Wabash Railroad Co.*, the case on which the Department primarily relies, the Supreme Court held that the failure of plaintiff's lawyer to attend a pretrial conference justified dismissing the case for want of prosecution. 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962). Because plaintiff "voluntarily chose [his] attorney as his representative," the Court held, he could "[ ]not . . . avoid the consequences of the acts or omissions of this freely selected agent." *Id.* at 633–34, 82 S.Ct. at 1390.

Neither *Link* nor any other case the Department cites, however, was a class action. In this case, except for the three named plaintiffs, not one of the thousands of class members "voluntarily chose" class counsel. Quite to the contrary, by certifying the class, the district court effectively appointed counsel for the farmers. Under Rule 23(a)(4), moreover, the district court, as a condition of class certification, had to find that class counsel would "adequately protect the interests of the class." FED. R.CIV.P. 23(a)(4); *see also McCarthy v. Kleindienst*, 741 F.2d 1406, 1411 n. 3 (D.C.Cir.1984) (noting that Rule 23's requirement of adequate representation encompasses "concerns about the competency of class counsel" (internal quotation marks and citation omitted)). Exercising this responsibility, the district court found that "Mr. Alexander Pires and Mr. Phillip Fraas as lead counsel and Mr. J.L. Chestnut, Mr. Othello Cross, Mr. T. Roe Frazer, Mr. Huboard T. Saunders, IV, Mr. Gerald Lear and Mr. James Myart, Jr., all serving as of counsel . . . demonstrated that they will advocate vigorously for the interests of the class" and therefore "adequately will represent the interests of the class." *Pigford v. Glickman*, 182 F.R.D. 341, 350 (D.D.C.1998).

In so distinguishing *Link*, we do not mean to suggest that the presumption of client accountability for attorney conduct

has no applicability in class actions. Certainly a contrary rule would make class action settlements problematic. Moreover, the Rule 23(a)(4) finding of class counsel adequacy may partially substitute for the free choice found in conventional non-class litigation. Like most presumptions, however, this one is rebuttable. And in litigation involving a class—defined from the outset by its numerosity—where counsel is not in fact freely chosen by class members, it is logical that the presumption should be more easily overcome than if the clients had in fact freely chosen their attorneys.

At oral argument, the Department pointed out that even though the farmers may not have "freely selected" class counsel to pursue the underlying litigation, the decree permits them to choose other lawyers for Track A or B representation. Accordingly, the Department argues, holding the farmers accountable for their lawyers' dismal performance is perfectly appropriate. We disagree. Although the decree technically permits class members to retain other lawyers, we think the circumstances of this case, together with the terms of the decree itself, make such choices unlikely. For one thing, the decree prohibits lawyers from charging for their work in claims proceedings, *see* Consent Decree ¶ 5(e), so lawyers desiring payment must seek fees pursuant to the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d). Class counsel, however, received an advance fee award to provide such services. Class counsel also benefit from the district court's Rule 23 seal of approval. No wonder Earl Kitchen (the only claimant for whom the record contains relevant information) was represented by Jesse Kearney, a member of one of the firms that shared in the fee advance and ultimately the $14.9 million settlement. Because Kitchen did not "voluntarily cho[o]se" Kearney in the usual sense, we see no basis for holding Kitchen responsible for Kearney's failure to file direct testimony on time.

Contrary to the Department's argument, we see nothing unfair about this result. Although we have no doubt that the Department expected Track B's tight deadlines to discourage claims—even to make them less winnable—the Department never counted on class counsel's virtual malpractice. Indeed, the decree itself assumes competent representation for the farmers. The decree's express purpose is to "ensur[e] that in their dealings with USDA, all class members receive full and fair treatment," Consent Decree at 2, and its "main accomplishment was the *establishment of a process* to adjudicate individual claims." Opinion and Order of the United States District Court for the District of Columbia at 8 (Mar. 8, 2001) (No. 97cv01978) (emphasis added). Unless the farmers have competent counsel, we cannot imagine how they could ever obtain "full and fair treatment" in a claims process where (as in Kitchen's case) missing a single deadline could be fatal.

For all of these reasons, we conclude that class counsel's failure to meet critical Track B deadlines amounts to an "unforeseen obstacle" that makes the decree "unworkable." *Rufo*, 502 U.S. at 384, 112 S.Ct. at 760. To hold otherwise would sanction the farmers' double betrayal: first by the Department, *see* CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 2–30, and then by their own lawyers.

Having said all this, however, we cannot affirm the challenged order as a proper Rule 60(b)(5) modification because of *Rufo*'s second requirement—that the modification be "suitably tailored to the changed circumstances." 502 U.S. at 391, 112 S.Ct. at 763. Because the districtcourt viewed its order as an interpretation, not a modification, it had no occasion to consider the tailoring requirement. In our view, the order, vesting arbitrators with generic authority to revise deadlines "so long as justice requires," *Pigford*, 182 F.Supp.2d at 52–53, is far too broad. Although the order restores the farmers to the position in which they would have been but for counsel's dismal performance (it may even, as the Depart-

ment argues, put them in a better position), the order potentially deprives the Department of all Track B deadlines. By contrast, a "suitably tailored" order would return *both* parties as nearly as possible to where they would have been absent counsel's failures. In Kitchen's case, a properly "tailored" remedy would, for example, reset the Track B clock at the point in the process where Kearney dropped the ball, establishing a new deadline for submitting direct testimony and leaving subsequent deadlines unchanged. Whatever tailoring method the district court ultimately adopts, *see United States v. Western Elec. Co.*, 46 F.3d 1198, 1207 (D.C.Cir.1995) (recognizing a district court's "considerable discretion" in fashioning a Rule 60(b)(5) modification), it must preserve the essence of the parties' bargain: for the farmers, an opportunity to have their individual claims pursued by competent counsel; and for the Department, the benefit of the consent decree's tight deadlines.

III.

We reverse the district court's order and remand the case for proceedings consistent with this opinion, Rule 60(b)(5), and *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 377, 112 S.Ct. 748, 756-57, 116 L.Ed.2d 867 (1992). *See* 28 U.S.C. § 2106 (authorizing federal appellate courts to "remand the cause and . . . require such further proceedings to be had as may be just under the circumstances").

So ordered.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov. 8, 2000]

Civil Action No. 97-1978 (PLF)

TIMOTHY PIGFORD, *et al.*,
Plaintiffs,

v.

DAN GLICKMAN, Secretary,
United States Department of Agriculture,
Defendant.

Civil Action No. 98-1693 (PLF)

CECIL BREWINGTON, *et al.*,
Plaintiffs,

v.

DAN GLICKMAN, Secretary,
United States Department of Agriculture,
Defendant.

ORDER

On April 14, 1999, the Court gave final approval to the Consent Decree that settled this case, finding that it represented a fair, reasonable and adequate resolution of the class members' claims. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000). As part of the settlement, the parties agreed that the Monitor ap-

pointed pursuant to the Consent Decree would be able to "[d]irect the facilitator, adjudicator, or arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice." Consent Decree ¶ 12(b)(iii) (April 14, 1999). In the Court's Order of Reference appointing the Monitor, the Court established the procedure by which claimants could file Petitions for Monitor Review in accordance with Paragraph 12(b)(iii) of the Consent Decree. *See* Order of Reference ¶ 8 (April 4, 2000). In a joint Stipulation and Order that the parties subsequently proposed to the Court and which the Court approved, the parties agreed to clarify the Petition for Monitor Review process by establishing a framework for deadlines by which all Petitions would have to be submitted to the Monitor. *See* Stipulation and Order ¶ 5 (July 14, 2000).

The deadline for the vast majority of claimants, November 13, 2000, is now fast approaching.[1] In an expedited motion for hearing filed on October 31, 2000, and at an emergency hearing held today, November 8, 2000, Class Counsel informed the Court that despite receiving requests from approximately 4,000 claimants to file Petitions for Monitor Review on their behalf, Class Counsel and Of Counsel have been able to file only 300 Petitions in the past four months. These numbers do not include the hundreds or thousands of

[1] The November 13 deadline applies to all claimants who received wholly or partially at adverse decisions under Track A or Track B on or before July 14, 2000—the date the Stipulation and Order was entered. Because most Track A and Track B claims had been decided by July 14, the November 13 deadline applies to the majority of claimants who might petition for Monitor review. For the much smaller number of claimants who have received or will receive decisions after July 14, 2000, those claimants have 120 days from the date of such decision to file a Petition for Monitor Review. *See* Stipulation and Order ¶ 5 (July 14, 2d). Those 120-day deadlines shall remain in effect and are not effected by this Order.

additional Petitions for Monitor Review that are being handled by unaffiliated counsel representing other class members or by claimants filing *pro se* without the assistance of a lawyer. In their motion and at today's hearing, Class Counsel asked that the Petition for Monitor Review process be modified to ensure that claimants would not bear the burden of counsel's inability to process Petitions at a rate sufficient to meet the November 13 deadline. The government vigorously opposed any modification of the July 14 Stipulation and Order, citing the agreement of the parties in Paragraph 5 of the Stipulation and Order that "[n]o extensions of these deadlines will be granted for any reason."

The Court agrees with the government that the deadlines should not be modified without further agreement of the parties; counsel should be held to the commitments to which hey agreed. On the other hand, counsel's failings should not be visited on their clients. The issue therefore is whether the Petition for Monitor Review process can be modified on a one-time basis without altering the deadlines by which Petitions must be filed and without undermining the negotiated stipulation of the parties.

At the hearing, the Court raised the possibility of allowing counsel to file a simple notice Petition to the Monitor by the November 13 deadline, specifying all claimants whom counsel represents who received a decision on or before July 14 and who are seeking Monitor review of that decision, but then delay the submission of materials in support of those Petitions until a later date that is fair to both the parties. Allowing this kind of notice Petition would reveal the total, finite number of claimants (and the names of all such claimants) who received a decision on or before July 14 and who are petitioning for Monitor review, and would allow the parties and the Monitor to manage the filing and resolution of these Petitions at a fair and reasonable pace. Furthermore, under such a process, any Petitioner who received a decision on or before July 14 but

fails to file a Petition until *after* the November 13 deadline would still be summarily reject in accordance with Paragraph 5 of the Stipulation and Order.

It is obvious that if Class Counse, Of Counsel and all unaffiliated counsel were forced to file thousands of fully supported Petitions by November 13, the government would be unable to respond to them in a meaningful way within the 60 days that it has to file a response. *See* Order of September 12, 2000. Furthermore, the Monitor informed the Court at the hearing that even if the government had the resources to complete such a task, the Monitor initially will be unable to decide the Petitions at a pace greater than 200 to 300 each month. In view of these realities, it would seem unfair to disenfranchise thousands of claimants merely because their lawyers have not met their obligations to the process—so long as the letter and spirit of the July 14 Stipulation and Order are not violated.

Upon consideration of the foregoing, and having considered the manifest injustice to claimants that would result if they are excluded from the Petition for Monitor Review process solely because of the failings of their attorneys, it is hereby

ORDERED that the deadline for Petitions for Monitor Review involving claimants who received a decision on or before July 14, 2000, remains November 13, 2000. Instead of filing fully supported Petitions for Monitor Review, however, the government or any claimant's counsel (including but not limited to Class Counsel and Of Counsel), may submit a Register of Petitions by that date. For each Register of Petitions filed on behalf of claimants, the Register shall list every claimant (and his or her claim number) who received a decision on or before July 14, 2000, and has asked the attorney or law firm for assistance with the filing of his or her Petition for Monitor Review it is

FURTHER ORDERED that a Register of Petitions shall not include any claimant who already has had an attorney file a Petition on his or her behalf, and shall include only those claimants who have presented counsel with a facially meritorious claim for a Petition for Monitor Review. No individual attorney or law firm may file more than one Register of Petitions, and all Registers of Petitions must be filed by November 13, 2000; it is

FURTHER ORDERED that if a Register of Petitions lists 400 or fewer claimants, counsel shall file materials in support of each Petition for Monitor Review by December 15, 2000. By that same date, counsel shall file notices of withdrawal with respect to those Petitions that upon further review counsel determines have no reasonable chance of satisfying the clear and manifest error standard set forth in Paragraph 12(b)(iii) of the Consent Decree; it is

FURTHER ORDERED that if a Register of Petitions lists more than 400 claimants, counsel shall file supporting materials or withdrawals, as described above, with respect to a total of at least 400 claimants by December 15, 2000. Counsel shall file similar supporting materials or withdrawals with respect to at least 400 more claimants on the 15th of every month thereafter. Under no circumstances shall the Monitor accept supporting materials or withdrawals after May 15, 2001; it is

FURTHER ORDERED that the deadlines mentioned herein will be satisfied so long as the filing is postmarked by the stated date. All Petition for Monitor Review, Registers of Petitions, supporting materials and withdrawals shall be sent to the Facilitator in accordance with previously established practice with respect to the Petitions for Monitor Review; and it is

FURTHER ORDERED that the Monitor shall submit monthly reports to the Court pursuant to Paragraph 12(b)(i) of

the Consent Decree that summarize the progress of any lawyer or law firm that files a Register of Petitions listing more than 400 claimants. Such reports shall be filed on the last day of every month, beginning on December 31, 2000.

SO ORDERED

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

Date: 11-8-00

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed July 14, 2000]

Civil Action No. 97-1978 (PLF)

TIMOTHY C. PIGFORD, *et al.*,
Plaintiffs,

v.

DAN GLICKMAN, Secretary,
The United States Department of Agriculture,
Defendant.

Civil Action No. 98-1693 (PLF)

CECIL BREWINGTON, *et al.*,
Plaintiffs,

v.

DANIEL R. GLICKMAN,
Defendant.

STIPULATION AND ORDER

WHEREAS on April 14, 1999 this Court approved and entered a Consent Decree in these consolidated actions that is designed to bring resolution and finality to the claims of race discrimination of those class members who opted to have their claims resolved under the adjudication or arbitration processes provided in the Consent Decree; and

WHEREAS the Consent Decree provided for a national, multimedia advertising campaign that commenced in January

1999 and was designed by advertising professionals to ensure that notice of the terms of the Consent Decree would receive the widest possible dissemination in a manner targeted specifically at class members; and

WHEREAS the Consent Decree provided a six-month period, commencing upon the Court's approval of the Decree on April 14, 1999 and ending on October 12, 1999, for persons to apply for class membership, and that, in fact, the Facilitator began receiving Claim Form and Election Sheets upon commencement of the advertising campaign in mid-January 1999; and

WHEREAS more than 24,000 claim forms were filed with the Consent Decree Facilitator during the nine-month period beginning with the commencement of the advertising campaign in mid-January 1999 and ending with the close of the period for filing claim forms in mid-October 1999; and

WHEREAS since the period for filing claim forms ended, thousands of additional persons have either filed Claim Form and Election Sheets, or requested them, in an effort to participate in the Consent Decree's claims resolution processes, and a significant number of persons who filed timely but deficient claim forms corrected their claim form deficiencies after the close of the period provided in the Consent Decree for filing claim forms; and

WHEREAS by Order dated December 20, 1999 this Court delegated to Michael Lewis the Court's authority to approve or deny petitions for late filing of Claim Sheet and Election Forms under ¶ 5(g) of the Consent Decree, and

WHEREAS a substantial number of the class members whose Track A and Track B claims have been, or will be, decided adversely to them have, or are expected to, petition the Monitor for review pursuant to ¶ 12(b)(iii) of the Consent Decree;

NOW, THEREFORE, plaintiffs and defendant hereby agree and stipulate as follows:

1. All timely filed but defective Claim Sheet and Election Forms that were corrected and resubmitted after the conclusion of the period prescribed by ¶ 5(c) of the consent Decree—October 12, 1999—shall be deemed to have been timely filed within the period prescribed by ¶ 5(c). Putative class members who did not submit a Claim Sheet and Election Form to the Facilitator within the period prescribed by ¶ 5(c) shall not be permitted to participate in the Consent Decree's adjudication or arbitration processes unless they are found to have satisfied the requirements of ¶ 5(g) of the Decree.

2. All putative class members who seek relief under ¶ 5(g) of the Consent Decree shall submit written requests for such relief to the Facilitator—without a Claim Sheet and Election Form—postmarked not later than September 15, 2000. No extensions of that deadline will be granted for any reason.

3. Michael K. Lewis, the Decree's Arbitrator, is hereby delegated this Court's authority to determine whether requests for relief under ¶ 5(g) of the Consent Decree that were filed after January 31, 2000 and before September 15, 2000 satisfy the requirements of that provision.

4. A putative class member whose request for relief under ¶ 5(g) is granted by Michael K. Lewis will be sent a letter and a Claim Sheet and Election Form by Mr. Lewis. The putative class member must file a completed Claim Sheet and Election Form with the Facilitator that is postmarked not later than 60 days from the date of the letter notifying the class member that his/her request for relief has been granted. No extensions of that deadline will be granted for any reason.

5. Any party who received a wholly or partially adverse decision under Track A or Track B as of the date of this Order shall have 120 days from the date of this Order to petition

the Monitor for review under ¶ 12(b)(iii) of the Consent Decree. Any party who, after the date of this Order, receives a wholly or partially adverse decision under Track A or Track B shall have 120 days from the date of such decision to petition the Monitor for review under ¶ 12(b)(iii) of the Consent Decree. No extensions of these deadlines will be granted for any reason.

6. Any party who receives a wholly or partially adverse decision under Track A or Track B shall be entitled to file only one petition for review under ¶ 12(b)(iii) of the Consent Decree, and neither the Monitor's decision on the petition for review, nor the decision of the Adjudicator or the Arbitrator upon reconsideration shall be subject to further review of any type in any forum.

7. Copies of this Stipulation and Order shall be (a) posted in a conspicuous public place in every USDA Farm Services Agency county office; and (b) mailed by the Facilitator to every person who (i) requested a Claim Sheet and Election Form and (ii) did not submit a completed Claim Form to the Facilitator within the period prescribed by ¶ 5(c) of the Consent Decree.

8. Any person who objects to any aspect of this Stipulation and Order shall submit his/her objections to the Court in writing not later than 30 days from the date of the entry of this Order.

/S/ ALEXANDER J. PIRES, JR.

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It is so ORDERED

Dated: 7/13/03

/s/ [Illegible]
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed April 4, 2000]

Civil Action No. 97-1978 (PLF)

TIMOTHY C. PIGFORD, *et al.*,
Plaintiffs,

v.

DAN GLICKMAN, Secretary,
The United States Department of Agriculture,
Defendant.

Civil Action No. 98-1693 (PLF)

CECIL BREWINGTON, *et al.*,
Plaintiffs,

v.

DANIEL R. GLICKMAN, Secretary,
The United States Department of Agriculture,
Defendant.

ORDER OF REFERENCE

The Consent Decree entered in this case on April 14, 1999, provided for the appointment of an Independent Monitor to carry out certain enumerated duties. Those duties are listed in paragraph 12 of the Consent Decree. The Consent Decree, negotiated by the parties, provides a limited, clearly-defined role for the Monitor. On January 4, 2000, this Court issued an Order appointing Randi Ilyse Roth as the Independent Monitor in this case.

In accordance with the terms of the Consent Decree and its remedial purposes, this Court's Opinion of April 14, 1999, *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), and the Court's Order of January 4, 2000, and pursuant to the Court's inherent power, it is hereby

ORDERED that the Monitor, as an agent and officer of the Court, shall have the responsibilities, powers, and protections as set forth in the Consent Decree and in this Order of Reference; it is

FURTHER ORDERED that the Monitor shall have the full cooperation of the parties, their counsel, and the Facilitator, Adjudicator and Arbitrator, who shall promptly provide any and all documentation and information requested by the Monitor, whether requested orally or in writing, and in whatever form requested, provided that the Monitor is authorized to request only non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable her to perform her duties; and it is

FURTHER ORDERED that:

1. The Monitor shall have *ex parte* access to this Court without prior notice to or consultation with the parties.

2. The Monitor shall have the right to confer and conduct confidential working sessions informally and on an *ex parte* basis with the parties and with the Facilitator, Adjudicator and Arbitrator on matters affecting the discharge of the Monitor's duties and the implementation of the Consent Decree.

3. The Monitor shall have authority to make informal suggestions to the parties in whatever form the Monitor deems appropriate in order to facilitate and aid implementation of the Consent Decree and compliance with Orders of the Court and shall have the authority to make recommendations to the Court.

4. As an agent and officer of the Court, the Monitor shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions

5. In addition to the power and authority granted elsewhere in this Order, the Monitor shall have all the responsibilities and powers enumerated in the Consent Decree. Specifically, as set forth in paragraph 12 of the Consent Decree, the Monitor shall:

(a) Make periodic written reports (not less than every six months) to the Court, the Secretary of Agriculture, Class Counsel, and Government Counsel on the good faith implementation of the Consent Decree;

(b) Attempt to resolve any problems that any class member may have with respect to any aspect of the Consent Decree;

(c) Direct the Facilitator, Adjudicator, or Arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

(d) Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

If the Monitor is unable within thirty (30) days to resolve a problem brought to her attention pursuant to subparagraph (b), above, she may file a report with the parties' counsel, any of whom may, in turn, seek enforcement of the Consent Decree pursuant to paragraph 13 of the Decree.

6. In carrying out her duties under paragraph 12(b)(i) of the Consent Decree (issuance of written reports), the Monitor

shall make such reports available to the public upon request. The Monitor shall not include in her reports any information that is prohibited from disclosure by the Privacy Act.

7. In carrying out her duties under paragraph 12(b)(ii) of the Consent Decree (resolving class members' problems), the Monitor has broad authority to work with claimants and USDA officials through correspondence, by telephone, and, if necessary, in person to attempt to resolve class members' problems, including problems involving injunctive relief (defined in paragraph 11 of the Consent Decree) and problems involving USDA collection actions. To fully carry out her duties pursuant to paragraph 12(b)(ii), the Monitor is encouraged to establish a mechanism through which her office can meet with claimants personally when necessary. The Monitor has informed the Court that she intends to open an office in Memphis, Tennessee, and that she plans to meet with groups of class members in other locations as needed and as her schedule allows.

8. In carrying out her duties under paragraph 12(b)(iii) of the Consent Decree (directing reexamination of claims), upon the filing of a Petition for Monitor Review, the Monitor shall review relevant materials and decide whether to order reexamination in accordance with the following procedures:

(a) *Standard of Review.* Pursuant to paragraph 12(b)(iii) of the Consent Decree, the Monitor may direct reexamination only when the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice.

(b) *Reexamination Only.* When the Monitor finds that the standard noted above has been met, the Monitor may direct the Facilitator, Adjudicator, or Arbitrator to reexamine the claim. The Monitor does not have the power to reverse any decision.

(c) *Filing of Petitions.* Claimants or the government may file Petitions for Monitor Review by sending the Monitor a letter that explains why the Petitioner believes that the decision of the Facilitator, Adjudicator, or Arbitrator is in error. With respect to Track A claims only, claimants or the government may include with the Petition for Monitor Review any documents that help the Petitioner to explain or establish that an error occurred. Petitions for Monitor Review should be sent to the following address:

Office of the Monitor
P.O. Box 64511
St. Paul, MN 55164-0511

Claimants are encouraged to seek the assistance of counsel in preparing their Petitions for Monitor Review, but they are not required to have the assistance of counsel. Claimants may obtain such assistance at no charge from Class Counsel Claimants may contact Class Counsel by writing or telephoning

Alexander J. Pires, Jr.
Conlon, Frantz, Phelan & Pires, LLP
Suite 700
1818 N Street NW
Washington, DC 20036
Phone: 202-331-7050

Petitions must be filed in writing, and the Monitor's review of the Petition will be a paper-only review, that is, it will not be supplemented by a personal or telephone interview.

(d) *Filing of Responses to Petitions.* The non-petitioning party may file a response to any Petition for Monitor Review and, with respect to petitions regarding Track A claims, the non-petitioning party may include documents as described in paragraph 8(e)(i), below. The Monitor

shall establish a system for notifying the non-petitioning party of the pendency of the Petition and for forwarding to the non-petitioning party copies of the Petition and any additional materials submitted by the Petitioner. The non-petitioning party shall have thirty (30) days to file a response, after which the right to file a response shall be waived.

(e) *Materials Constituting Basis of Monitor Review.* Generally, the Monitor's review will be based only on the Petition for Monitor Review, any response thereto, the record that was before the Facilitator, Adjudicator or Arbitrator, and the decision that is the subject of the Petition for Monitor Review.

(i) *Review of Track A Claims.* The Monitor may consider additional materials submitted by the claimant or by the government with a Petition for Monitor Review of a Track A claim or with a response to such a Petition only when such materials address a potential flaw or mistake in the claims process that in the Monitor's opinion would result in a fundamental miscarriage of justice if left unaddressed. The decision to consider additional materials regarding this flaw or mistake and to permit those materials to be made part of the record for review upon reexamination by the Facilitator or Adjudicator is within the discretion of the Monitor.

(ii) *Review of Track B Claims.* The Consent Decree provides for the development of a more comprehensive record in Track B than is possible Track A. Therefore, in Track B claims, the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination.

(f) *Communication Regarding Reexamination.* When the Monitor directs the Facilitator, Adjudicator, or Arbitrator to reexamine a claim, the Monitor shall send to the

Facilitator, Adjudicator or Arbitrator a brief written explanation of the basis of her decision to direct reexamination (reexamination letters), which shall be attached to the Petition for Monitor Review. The explanation will clearly specify the error(s) identified by the Monitor. The Monitor will promptly forward to the claimant (and his or her counsel, if any) and to USDA copies of all reexamination letters with the attached Petitions for Monitor Review and any additional materials admitted into the record by the Monitor pursuant to paragraph 8(e)(i) These materials will become part of the record for purposes of the Facilitator's, Adjudicator's or Arbitrator's reexamination.

9. *Contacting the Monitor.* In carrying out her duties under paragraph 12(b)(iv) of the Consent Decree, the Monitor will be available to class members and to the public through the following toll-free telephone number: 1-877-924-7483

10. *Where to Direct Communications.* Inquiries, petitions and pleadings in this case should be directed as follows:

(a) Inquiries regarding the status of Track A adjudication claims and regarding the timing of payments of approved claims should be directed to the Claims Facilitator at 1-800-646-2873

(b) Motions seeking review of non-final rulings by an arbitration panelist, including issues relating to discovery and scheduling, should be directed to Arbitrator Michael Lewis at ADR Associates, 1666 Connecticut Avenue, N.W., Washington, DC 20009.

(c) Petitions for Monitor Review of final decisions in both Track A and Track B claims should be directed to the Monitor's office as explained in paragraph 8(c) above

(d) Inquiries regarding problems with injunctive relief or with other aspects of the Consent Decree should be

directed to the Monitor's office as explained in paragraph 9 above

(e) Pleadings regarding attorneys' fees should be directed to the Court. None of the matters described in subparagraphs (a)-(d), above, shall be filed with, or otherwise presented to, the Court.

11. *Monitor Staff.* The Monitor shall have the authority to employ and/or contract with all necessary attorney, paralegal, administrative, and clerical staff within a budget cap approved by the Court. The staff and contractors of the Office of the Monitor shall have whatever access to records and documents the Monitor believes is necessary to fulfill the gaff or contracting role; however, the staff and contractors shall be given access only to non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable the Monitor to perform her duties under the Consent Decree

12. *Fees and Expenses.* Pursuant to paragraph 12(a) of the Consent Decree, the United States Department of Agriculture ("USDA") shall pay the fees and expenses of the Monitor and the salaries of her staff.

13. *Approval of Budgets.* The Monitor shall submit budgets to the Court for approval. Each budget shall cover a period of at least three (3) months but not more than twelve (12) months. Copies of each budget shall be made available to USDA and class counsel, who will have a period of ten (10) working days from their receipt of the budget within which they may file with the Court, with copies to the Monitor and the opposing party written objections to the budget. Any party that does not object to a budget within these ten (10) days shall be deemed to have waived any objection permanently. At the end of the ten (10) days, the Court will enter an order approving a total budget amount for the relevant time period.

14. *Timing of Budget Submissions.* The Monitor generally will submit proposed budgets to the Court one (1) month in advance of the beginning of the budget period the Monitor advises the Court that she has entered into a tentative agreement with USDA regarding payment of fees and expenses for the period of January 4, 2000, through March 31, 2000. The first budget period to be approved by the Court, therefore, begins on April 1, 2000. The Monitor is directed to submit the budget for the period beginning April 1, 2000, by April 13, 2000.

15. *Invoicing.* The Monitor shall submit a statement to the Court approximately monthly for approval of her fees and expenses with copies to counsel for both parties. Objection to the statement shall be filed with the Court, with copies to the Monitor and to the opposing party, within ten (10) days of the submission of the statement. Any party that does riot object to a fee statement within ten (10) days of its submission shall be deemed to have waived any objection permanently. At the conclusion of the 10-day period, the Court will inter an order directing payment of any sums approved. Any sum approved by the Court shall be paid within fifteen (15) days unless otherwise ordered or agreed upon.

16. *Records.* The Monitor shall keep a complete record of all of her fees and expenses, which shall be made available at the Court's or the parties' request for their inspection.

17. *Payment into Court Registry.* Within fifteen (15) days after the Court's approval of the first budget, USDA shall deposit with the Clerk of Court, United States District Court for the District of Columbia, the pro-rata portion of the approved budget for the month of April, 2000. Within the first fifteen (15) days of May, 2000, and within the first fifteen (15) days of each month thereafter during the Monitor's tenure, USDA shall deposit with the Clerk of Court a sum equal to a pro-rata month's portion of the approved budget. All deposits made by USDA shall be placed by the Clerk of

Court in an interest-bearing account. Any monies on deposit with the Clerk of Court that are unspent in a given month shall be carried over and applied to payment of future fees and expenses of the Monitor.

18. *Refund of Surplus.* At such point as the Monitor's duties are completed, surplus funds on deposit with the Clerk's Office will be refunded to USDA. If the Court determines at any time that the Monitor will require supplemental funds, the Court may so order USDA to make additional deposits.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 4/4/00

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed April 14, 1999]

Civil Action No. 97-1978 (PLF)

TIMOTHY C. PIGFORD, *et al.*,
Plaintiffs,

v.

DAN GLICKMAN, Secretary,
The United States Department of Agriculture,
Defendant.

Civil Action No. 98-1693 (PLF)

CECIL BREWINGTON, *et al.*,
Plaintiffs,

v.

DANIEL R. GLICKMAN,
Defendant.

CONSENT DECREE

WHEREAS the parties desire to resolve amicably all the claims raised in these suits, including the plaintiffs' claims under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*; and

WHEREAS the parties have agreed upon mutually satisfactory terms for the complete resolution of all the claims that

have, or could have, been asserted by the plaintiffs in this litigation; and

WHEREAS, in light of the remedial purposes of this Consent Decree, the parties intend that it be liberally construed to effectuate those purposes in a manner that is consistent with law; and

WHEREAS the parties have entered into this Consent Decree for the purpose of ensuring that in their dealings with USDA, all class members receive full and fair treatment that is the same as the treatment accorded to similarly situated white persons;

NOW THEREFORE, the plaintiffs and the defendant, Dan Glickman, Secretary of the United States Department of Agriculture ("USDA"), hereby consent to the entry of this decree with the following terms:

1. Definitions

The following terms shall have the following meanings for purposes of this Consent Decree.

(a) The term "adjudicator" shall mean (i) the person or persons who is/are assigned by the facilitator to undertake the initial review of, and where appropriate make recommended decision on Track A claims under ¶ 9, below; and (ii) JAMS-Endispute, Inc., which shall make the final decision in all Track A claims, and resolve issues of tolling under ¶ 6, below.

(b) The term "arbitrator" shall mean Michael K. Lewis of ADR Associates, and the other person or persons selected by Mr. Lewis who meet qualifications agreed upon by the parties and by Mr. Lewis and whom Mr. Lewis assigns to decide Track B claims under ¶ 10, below.

(c) The term "claimant" shall mean any person who submits a claim package for relief under the terms of this Consent Decree.

(d) The term "claim package" shall mean the materials sent to claimants who request them in connection with submitting a claim for relief under the provisions of this Consent Decree. The claim package will include (i) a claim sheet and election form and a Track A Adjudication claim affidavit, copies of which are attached hereto as Exhibit A; and (ii) associated documentation and instructions.

(e) The term "class counsel" shall mean Alexander J. Pires, Jr. and Phillip L. Fraas, Lead Counsel for members of the class defined in ¶ 2(a), *infra*. In addition, the following counsel and law firms have been acting, and will continue to act, as Of Counsel in this case: J.L. Chestnut, of Chestnut, Sanders, Sanders & Pettaway, P.C., Selma, AL.; T. Roe Frazer of Langston, Frazer, Sweet & Freese, P.A., Jackson, MS.; Hubbard Saunders, IV, of The Terney Firm, Jackson, MS.; Othello Cross, of Cross, Kearney & McKissic, Pine Bluff, AR., Gerard Lear of Speiser Krause, Arlington, VA.; and William J. Smith, Fresno, CA.

(f) The term "credit" shall mean the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment or to purchase property or services and defer payment therefor.

(g) The term "defendant's counsel" shall mean the United States Department of Justice.

(h) The term "discrimination complaint" shall mean a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal official who forwarded the class member's communication to USDA, asserting that USDA had discriminated against the class member on the basis of race in connection with a federal farm credit transaction or benefit application.

(i) The term "facilitator" shall mean the Poorman-Douglas Corporation, which shall receive claims pursuant to this Consent Decree and assign claims to adjudicators and arbitrators

for final resolution. The parties may, by agreement and without the Court's approval, assign to the facilitator such additional tasks related to the implementation of this Consent Decree as they deem appropriate.

(j) The term "preponderance of the evidence" shall mean such relevant evidence as is necessary to prove that something is more likely true than not true.

(k) The term "priority consideration" means that an application will be given first priority in processing, and with respect to the availability of funds for the type of loan at issue among all similar applications filed at the same time; provided, however, that all applications to be given priority consideration will be of equal status.

(l) The term "substantial evidence" shall mean such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion. Substantial evidence is a lower standard of proof than preponderance of the evidence.

(m) The term "USDA" shall include the United States Department of Agriculture and all of its agencies, instrumentalities, agents, officers, and employees, including, but not limited to the state and county committees which administer USDA credit programs, and their staffs.

(n) The term "USDA listening session" shall mean one of the meetings of farmers and USDA's representatives conducted by USDA's Civil Rights Action Team between January 6, 1997 and January 24, 1997.

2. Class Definition

(a) Pursuant to Fed. R. Civ. P. 23(b)(3) the Court hereby certifies a class defined as follows:

> All African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December

31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

(b) Any putative class member who does not wish to have his claims adjudicated through the procedure established by this Consent Decree may, pursuant to Federal Rule of Civil Procedure 23(c)(2), request to be excluded from the class. To be effective, the request must be in writing and filed with the facilitator within 120 days of the date on which this Consent Decree is entered.

3. Duties of Facilitator.

(a) Poorman-Douglas Corporation shall serve as the facilitator and shall perform the following functions:

(i) publish the Notice of Class Settlement in the manner prescribed in ¶ 4, below;

(ii) mail claim packages to claimants who request them;

(iii) process completed claim packages as they are received;

(iv) determine, pursuant to the terms of this Consent Decree, which claimants satisfy the class definition as contained in ¶ 2(a);

(v) transmit to adjudicators claim packages submitted by claimants who contend that they are entitled to participate in the claims process due to equitable tolling of ECOA's statute of limitations under the particular circumstances of their claim;

(vi) transmit to the adjudicator the claims packages of class members with ECOA claims who elect to proceed under Track A;

(vii) transmit to the arbitrator the claims packages of class members with ECOA claims who elect to proceed under Track B;

(viii) transmit to the adjudicator the claims packages of class members who assert only non-credit benefit claims; and

(ix) maintain and operate a toll-free telephone number to provide information to interested persons about the procedure for filing claims under this Consent Decree.

(b) The facilitator's fees and expenses shall be paid by USDA.

4. Class Notice Procedure

(a) Within 10 days after the entry of the Order granting preliminary approval of this Consent Decree the facilitator shall mail a copy of the Notice of Class Certification and Proposed Class Settlement (a copy of which is attached hereto as Exhibit B) to all then-known members of the class.

(b) As soon as possible after entry of the Order granting preliminary approval of this Consent Decree the facilitator shall take the following steps:

(i) arrange to have 44 commercials announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing aired on the Black Entertainment Network, and 18 similar commercials on Cable News Network, during a two-week period;

(ii) arrange to have one-quarter page advertisements announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in 27 general circulation newspapers, and 115 African-American newspapers, in an 18-state region during a two-week period; and

(iii) arrange to have a full page advertisement announcing the preliminary approval of the Consent Decree and the time and place of the fairness hearing placed in the editions of TV Guide that are distributed in an 18-state region, and a half page advertisement in the national edition of Jet Magazine.

(c) USDA shall use its best efforts to obtain the assistance of community based organizations, including those organizations that focus on African-American and/or agricultural issues, in communicating to class members and potential class members the fact that the Court has preliminarily approved this Consent Decree and the time and place of the fairness hearing.

5. Class Membership Screening: Election by Claimant; Processing.

(a) The facilitator shall send claim packages to claimants who request them.

(b) To be eligible to obtain relief pursuant to this Consent Decree, a claimant must complete the claim sheet and return it and any supporting documentation to the facilitator. The claimant must also provide to the facilitator evidence, in the form described below, that he filed a discrimination complaint between January 1, 1981 and July 1, 1997:

(i) a copy of the discrimination complaint the claimant filed with USDA, or a copy of a USDA document referencing the discrimination complaint; or

(ii) a declaration executed pursuant to 28 U.S.C. § 1746 by a person who is not a member of the claimant's family and which states that the declarant has first-hand knowledge that the claimant filed a discrimination complaint with USDA; and (2) describes the manner in which the discrimination complaint was filed; or

(iii) a copy of correspondence from the claimant to a member of Congress, the White House, or a state, local, or

federal official averring that the claimant has been discriminated against, except that, in the event that USDA does not possess a copy of the correspondence, the claimant also shall be required to submit a declaration executed pursuant to 28 U.S.C. § 1746 by the claimant stating that he sent the correspondence to the person to whom it was addressed; or

(iv) a declaration executed pursuant to 28 U.S.C. § 1746 by a non-familial witness stating that the witness has first-hand knowledge that, while attending a USDA listening session, or other meeting with a USDA official or officials, the claimant was explicitly told by a USDA official that the official would investigate that specific claimant's oral complaint of discrimination.

(c) In order to be eligible for relief under ¶¶ 9 or 10, below, a claimant must submit his completed claim package to the facilitator postmarked within 180 days of the date of entry of this Consent Decree, except that a claimant whose claim is otherwise timely shall have not less than 30 days to submit a declaration pursuant to subparagraph (b)(iii), above, after being directed to do so without regard to the 180-day period.

(d) At the time a claimant who asserts an ECOA claim submits his completed claim package, he must elect whether to proceed under Track A, *see* ¶ 9, below, or Track B *see* ¶ 10, below, except that claimants whose claims arise exclusively under non-credit benefit programs shall be required to proceed under Track A. A class member's election under this subparagraph shall be irrevocable and exclusive.

(e) Each completed claim package must be accompanied by a certification executed by an attorney stating that the attorney has a good faith belief in the truth of the factual basis of the claim, and that the attorney has not and will not require the claimant to compensate the attorney for assisting him.

(f) Within 20 days of receiving a completed claim package the facilitator shall determine, pursuant to subparagraph (b), above, whether the claimant is a member of the class as defined by ¶ 2(a). If a claimant is determined to be a class member, the facilitator shall assign the class member a consent decree case number, refer the claim package to an adjudicator or an arbitrator, as appropriate, and send a copy of the entire claim package to the class counsel and defendant's counsel along with a notice that includes the class member's name, address, telephone number, social security number, con sent decree case number, and that identifies the track under which the class member is proceeding. If a claimant is found not to be a class member, the facilitator shall notify the claimant and the parties' counsel of that finding.

(g) A claimant who satisfies the definition of the class in ¶ 2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the Court to permit him to nonetheless participate in the claims resolution procedures provided in ¶¶ 9 & 10, below. The Court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

6. Tolling of ECOA's Statute of Limitations.

(a) In addition to the class defined herein, a person who otherwise satisfies the criteria for membership in the class defined in ¶ 2(a), above, but who did not file a discrimination complaint until after July 1, 1997, shall be entitled to relief under this Consent Decree by demonstrating, consistent with *Irwin v. United States*, 498 U.S. 89 (1990), that:

(i) he has actively pursued his judicial remedies by filing a defective pleading during the applicable statute of limitations period;

(ii) he was induced or tricked by USDA's misconduct into allowing the filing deadline for the applicable statute of limitations period to pass; or

(iii) he was prevented by other extraordinary circumstances beyond his control from filing a complaint in a timely manner, provided that excusable neglect shall not qualify as extraordinary circumstances.

(b) Within 10 days of a receiving a completed claim package from a person who did not file a discrimination claim until after July 1, 1997, the facilitator shall forward the claim to an adjudicator. The adjudicator shall then determine whether the claim is timely pursuant to subparagraphs (a)(i), (ii), or (iii), above. If the claim is found to be qualified under subparagraph (a), above, the adjudicator shall return the claim package to the facilitator, along with a written determination to that effect. The facilitator shall then process the claim pursuant to ¶ 5(f), above, and the claimant shall be eligible for the relief provided herein for class members. If the claim is found by the adjudicator to be untimely, the adjudicator shall return the claim package to the facilitator with a written determination to that effect. The facilitator shall promptly notify the claimant of the adjudicator's decision.

7. Interim Administrative Relief

Upon being advised by the facilitator that a claimant satisfies the class definition in ¶ 2(a), above, or that a claimant has met the criteria for equitable tolling under ¶ 6, above, USDA shall immediately cease all efforts to dispose of any foreclosed real property formerly owned by such person. USDA also will refrain from foreclosing on real property owned by the claimant or accelerating the claimant's loan account; however, USDA may take such action up to but not including foreclosure or acceleration that is necessary to protect its interests. USDA may resume its efforts to dispose of any such real property after a final decision in USDA's favor on the class member's claim pursuant to ¶¶ 9 or 10, below.

8. Response by USDA to a Track A Referral Notice

In any Track A case USDA may, within 60 days after receipt of the materials and notice the facilitator is required,

pursuant to ¶ 5(f), above, to furnish to USDA with respect to persons who are determined to be class members, provide to the adjudicator assigned to the claim, and to class counsel, any information or materials that are relevant to the issues of liability and/or damages.

9. Track A—Decision by Adjudicator

(a) In cases in which a class member asserts an ECOA violation and has elected to proceed under Track A:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under ¶ 5, along with any material submitted by defendant pursuant to ¶ 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he owned or leased, or attempted to own or lease, farm land;

(B) he applied for a specific credit transaction at a USDA county office during the period identified in ¶ 2(a), above;

(C) the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and

(D) USDA's treatment of the loan application led to economic damage to the class member.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the class counsel and defendant's counsel, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class member:

(A) USDA shall discharge all of the class member's outstanding debt to USDA that was incurred under, or affected by, the program(s) that was/were the subject of the ECOA claim(s) resolved in the class member's favor by the adjudicator. The discharge of such outstanding debt shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program;

(B) The class member shall receive a cash payment of $50,000 that shall be paid from the fund described in 31 U.S.C. § 1304 ("the Judgment Fund");

(C) an additional payment equal to 25% of the sum of the payment made under subparagraph (B), above, and the principal amount of the debt forgiven under subparagraph (A), above, shall be made by electronic means directly from the Judgment Fund to the Internal Revenue Service as partial payment of the taxes owed by the class member on the amounts paid or forgiven pursuant to those provisions;

(D) The injunctive relief made available pursuant to ¶ 11, below; and

(E) The immediate termination of any foreclosure proceedings that USDA has initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator; and the return of any USDA inventory property that formerly was owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the adjudicator.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(b) In cases in which a class member asserts only non-credit claims under a USDA benefit program:

(i) the adjudicator shall, within 30 days of receiving the material required to be submitted by the class member under ¶ 5, along with any material submitted by defendant pursuant to ¶ 8, above, determine on the basis of those materials whether the class member has demonstrated by substantial evidence that he was the victim of race discrimination. To satisfy this requirement, the class member must show that:

(A) he applied for a specific non-credit benefit program at a USDA county office during the period identified in ¶ 2(a), above; and

(B) his application was denied or approved for a lesser amount than requested, and that such treatment was different than the treatment received by specifically identified, similarly situated white farmers who applied for the same non-credit benefit.

(ii) The adjudicator's decision shall be in a format to be agreed upon by the parties, and shall include a statement of the reasons upon which the decision is based.

(iii) In any case in which the adjudicator decides in a class member's favor, the following relief shall be provided to the class members:

(A) USDA shall pay to the class member the amount of the benefit wrongly denied, but only to the extent that funds that may lawfully be used for that purpose are then available; and

(B) The injunctive relief made available pursuant to ¶ 11(c)-(d), below.

(iv) If the adjudicator determines that a class member's claim is not supported by substantial evidence, the class member shall receive no relief under this Consent Decree.

(v) The decision of the adjudicator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the adjudicator with respect to any claim that is, or could have been decided by the adjudicator.

(c) The adjudicator's fees and expenses shall be paid by USDA.

10. Track B—Arbitration

(a) Within 10 days of receiving the completed claim package of a class member who has elected to proceed under Track B, the arbitrator shall notify the class member and defendant of the date on which an evidentiary hearing on the class member's claim will be held. The hearing shall be scheduled for a date that is not less than 120 days, nor more than 150 days, from the date on which the hearing notice is sent.

(b) At least 90 days prior to the hearing described in subparagraph (a), above, USDA and the class member shall file with the arbitrator and serve on each other a list of the witnesses they intend to call at the hearing along with a statement describing in detail the testimony that each witness is expected to provide, and a copy of all exhibits that each side intends to introduce at such hearing. The parties shall be required to produce for a deposition, and for cross examination at the arbitration hearing, any person they identify as a witness pursuant to subparagraph (a), above.

(c) Each side shall be entitled to depose any person listed as a witness by his opponent pursuant to subparagraph (b), above.

(d) Discovery shall be completed not later than 45 days before the date of the hearing described in subparagraph (a), above.

(e) Not less than 21 days prior to commencement of the hearing described in subparagraph (a), above, each side shall (i) notify the other of the names of those witnesses whom they intend to cross-examine at the hearing; and (ii) file with the arbitrator memoranda addressing the legal and factual issues presented by the class member's claim.

(f) The hearing shall be conducted in accordance with the Federal Rules of Evidence. All direct testimony shall be introduced in writing and shall be filed with the arbitrator and served on the opposing side at least 30 days in advance of the hearing. The hearing shall be limited in duration to eight hours, with each side to have up to four hours within which to cross examine his opponent's witnesses, and to present his legal arguments.

(g) The arbitrator shall issue a written decision 30-60 days after the date of the hearing. If the arbitrator determines that the class member has demonstrated by a preponderance of the evidence that he was the victim of racial discrimination and that he suffered damages therefrom, the class member shall be provided the following relief:

(i) actual damages as provided by ECOA, 15 U.S.C. § 1691e(a) to be paid from the Judgment Fund;

(ii) USDA shall discharge all of the class member's outstanding debt to the Farm Service Agency that was incurred under, or affected by, the program(s) that were the subject of the claim(s) resolved in the class member's favor by the arbitrator. The discharge of such outstanding debt shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program;

(iii) The injunctive relief made available pursuant to ¶ 11, below; and

(iv) The immediate termination of any foreclosure proceedings that have been initiated against any of the class member's real property in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator, and the return of any USDA inventory property that was formerly owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member's favor by the arbitrator.

(h) If the arbitrator rules in the defendant's favor, the class member shall receive no relief under this Consent Decree.

(i) The decision of the arbitrator shall be final, except as provided by ¶ 12(b)(iii), below. The parties hereby agree to forever waive their right to seek review in any court or before any tribunal of the decision of the arbitrator with respect to any claim that is, or could have been decided, by the arbitrator.

(k) The arbitrator's fees and expenses shall be paid by USDA.

11. Class-Wide Injunctive Relief

(a) USDA will provide each class member who prevails under ¶¶ 9(a) or 10 with priority consideration, on a one-time basis, for the purchase, lease, or other acquisition of inventory property to the extent permitted by law. A class member must exercise his right to the relief provided in the preceding sentence in writing and within 5 years of the date this order.

(b) USDA will provide each class member who prevails under ¶¶ 9(a) or 10 with priority consideration for one direct farm ownership loan and one farm operating loan at any time up to five years after the date of this Order. A class member must notify USDA in writing that he is exercising his right under this agreement to priority consideration in order to receive such consideration.

(c) Any application for a farm ownership or operating loan, or for inventory property submitted within five years of

the date of this Consent Decree by any class member who prevails under ¶¶ 9 or 10, will be viewed in a light most favorable to the class member, and the amount and terms of any loan will be the most favorable permitted by law and USDA regulations. Nothing in the preceding sentence shall be construed to affect in any way the eligibility criteria for participation in any USDA loan program, except that outstanding debt discharged pursuant to ¶¶ 9(a)(iii)(A) or 10(g)(ii), above, shall not adversely affect the claimant's eligibility for future participation in any USDA loan or loan servicing program.

(d) In conjunction with any application for a farm ownership or operating loan or for inventory property submitted by a class member who prevails under ¶¶ 9 or 10, above, USDA shall, at the request of such class member provide the class member with reasonable technical assistance and service, including the assistance of qualified USDA employees who are acceptable to the class member, in connection with the class member's preparation and submission of any such application.

12. Monitor

(a) From a list of three persons submitted to it jointly by the parties, or, if after good faith negotiations they cannot agree, two persons submitted by plaintiffs and two persons submitted by defendant, the Court shall appoint an independent Monitor who shall report directly to the Secretary of Agriculture. The Monitor shall remain in existence for a period of 5 years and shall not be removed except upon good cause. The Monitor's fees and expenses shall be paid by USDA.

(b) The Monitor shall:

(i) Make periodic written reports (not less than every six months) to the Court, the Secretary, class counsel, and defendant's counsel on the good faith implementation of this Consent Decree;

(ii) Attempt to resolve any problems that any class member may have with respect to any aspect of this Consent Decree;

(iii) Direct the facilitator, adjudicator, or arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

(iv) Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any consent decree complaints and to expedite their resolution.

(c) If the Monitor is unable within 30 days to resolve a problem brought to his attention pursuant to subparagraph (ii), above, he may file a report with the parties' counsel who may, in turn, seek enforcement of this Consent Decree pursuant to ¶ 13, below.

13. Enforcement Procedures

Before seeking any order by the Court concerning the alleged violation of any provision of this Consent Decree, the parties must comply with the following procedures:

(a) The person seeking enforcement of a provision of this Consent Decree shall serve on his opponent a written notice that describes with particularity the term(s) of the Consent Decree that are alleged to have been violated, the specific errors or omissions upon which the alleged violation is based, and the corrective action sought. The person alleging the violation shall not inform the Court of his allegation at that time.

(b) The parties shall make their best efforts to resolve the matter in dispute without the Court's involvement. If requested to do so, the movant shall provide to his opponent any information and materials available to the movant that support the violation alleged in the notice.

(c) The person who served the notice of violation pursuant to subparagraph (a), above, may not move for enforcement of this Consent Decree until at least 45 days after the date on which he served the notice.

14. Attorney's Fees

(a) Class counsel (for themselves and all Of-Counsel) shall be entitled to reasonable attorney's fees and costs under ECOA, 15 U.S.C. § 1691e(d), and to reasonable attorney's fees, costs, and expenses under the APA, 28 U.S.C. § 2412(d) (as appropriate), that are generated in connection with the filing of this action and the implementation of this Consent Decree. Defendant reserves the right to challenge any and all aspects of class counsel's application for fees, costs, and/or expenses.

(b) Recognizing the fees, costs, and/or expenses already incurred, and given the anticipated fees, costs, and/or expenses to be incurred by class counsel in the implementation of this Consent Decree, defendant will make a one-time payment to class counsel of $1,000,000 as a credit toward class counsel's application for attorney's fees, costs, and/or expenses. The payment shall be made to class counsel and of counsel (payable to Alexander J. Pires, Jr. and Phillip L. Fraas) within 20 days of the date on which this Consent Decree is entered by the Court. This one-time payment shall be credited against any ultimate award or negotiated settlement of fees, costs, and expenses, and to the extent any such ultimate award or settlement is less than this one-time payment, class counsel shall refund to defendant the entire amount by which this one-time payment exceeds the award or settlement amount.

(c) The provision of attorney's fees, costs, and/or expenses in this Consent Decree is by agreement of the parties and shall not be cited a precedent in any other case.

15. Parties' Respective Responsibilities

No party to this Consent Decree is responsible for the performance, actions, or obligations of any other party to this Consent Decree.

16. Fairness Hearing

(a) Upon the parties' execution of this Consent Decree, the parties shall transmit the Decree to the Court for preliminary approval; request that the Court schedule a fairness hearing on the Consent Decree; and request that the Court, upon issuance of an order granting preliminary approval of this Decree, issue an order setting aside the dates currently scheduled for trial and staying this litigation.

(b) Within 5 days of the execution of this Consent Decree by class counsel and defendant's counsel, the Notice of Class settlement provided for in ¶ 4, above, containing, *inter alia*, a notice of the fairness hearing on this Consent Decree shall be sent to all known, potential members of the class. The fairness hearing will be held at 10:00 AM on March 2, 1999, in Courtroom 20 of the E. Barrett Pettyman United States Courthouse at 3rd St. and Constitution Ave., N.W., Washington, D.C. Any objections to the entry of this Consent Decree shall be filed not later than February 15, 1999.

17. Final Judgment

If, after the fairness hearing, the Court approves this Consent Decree as fair, reasonable, and adequate, a Final Judgment, the entry of which shall be a condition precedent to any obligation of any party under this Consent Decree, shall be entered dismissing with prejudice, pursuant to the terms of this Consent Decree and Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, all claims in the litigation.

18. Releases

As provided by the ordinary standards governing the preclusive effects of consent decrees entered in class actions, all

members of the class who do not opt out of this Consent Decree pursuant to ¶ 2(b), above, and their heirs, administrators, successors, or assigns (together, the "Releasors"), hereby release and forever discharge the defendant and his administrators or successors, and any department, agency, or establishment of the defendant, and any officers, employees, agents, or successors of any such department, agency, or establishment (together, the "Releasees") from—and are hereby themselves forever barred and precluded from prosecuting—any and all claims and/or causes of action which have been asserted in the Seventh Amended Complaint, or could have been asserted in that complaint at the time it was filed, on behalf of this class, by reason of, or with respect to, or in connection with, or which arise out of, any matters alleged in the complaint which the Releasors, or any of them, have against the Releasees, or any of them. It also is expressly understood that any class-wide claims of race-based discrimination in USDA's credit programs by members of the class defined in ¶ 2(a), above are barred unless the operative facts giving rise thereto did not occur prior to the entry of this Decree.

19. Defendant's Duty Consistent With Law and Regulations

Nothing contained in this Consent Decree or in the Final Judgment shall impose on the defendant any duty, obligation or requirement, the performance of which would be inconsistent with federal statutes or federal regulations in effect at the time of such performance.

20. No Admission of Liability

Neither this Consent Decree nor any order approving this Consent Decree is or shall be construed as an admission by the defendant of the truth of any allegation or the validity of any claim asserted in the complaint, or of the defendant's liability therefor, nor as a concession or an admission of any fault or omission of any act or failure to act, or of any statement, written document, or report heretofore issued, filed or

made by the defendant, nor shall this Consent Decree nor any confidential papers related hereto and created for settlement purposes only, nor any of the terms of either, be offered or received as evidence of discrimination in any civil, criminal, or administrative action or proceeding, nor shall they be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing on the part of the defendant, nor as an admission by any party to this Consent Decree that the consideration to be given hereunder represents the relief which could be recovered after trial. However, nothing herein shall be construed to preclude the use of this Consent Decree in order to effectuate the consummation, enforcement, or modification of its terms.

21. No Effect if Default

Subject to the terms of ¶ 17, above, and following entry by the Court of Final Judgment, no default by any person or party to this Consent Decree in the performance of any of the covenants or obligations under this Consent Decree, or any judgment or order entered in connection therewith, shall affect the dismissal of the complaint, the preclusion of prosecution of actions, the discharge and release of the defendant, or the judgment entered approving these provisions. Nothing in the preceding sentence shall be construed to affect the Court's jurisdiction to enforce the Consent Decree on a motion for contempt filed in accordance with ¶ 13.

22. Effect of Consent Decree if Not Approved

This Consent Decree shall not become binding if it fails to be approved by the Court or if for any reason it is rendered ineffective in any judicial proceeding before initially taking effect. Should it fail to become binding, this Consent Decree shall become null and void and shall have no further force and effect, except for the obligations of the parties under this paragraph. Further, in that event: this Consent Decree; all negotiations in connection herewith; all internal, private dis-

cussions among the Department of Justice and/or USDA conducted in furtherance of the settlement process to determine the advisability of approving this Consent Decree; and all statements made by the parties at, or submitted to the Court during, the fairness hearing shall be without prejudice to any person or party to this Consent Decree, and shall not be deemed or construed to be an admission by any party to this Consent Decree of any fact, matter, or proposition.

23. Entire Terms of Agreement

The terms of this Consent Decree constitute the entire agreement of the parties, and no statement, remark, agreement, or understanding, oral or written, which is not contained herein, shall be recognized or enforced.

24. Authority of Class Counsel

Class counsel who are signatories hereto hereby represent, warrant, and guarantee that such counsel are duly authorized to execute this Consent Decree on behalf of the plaintiffs, the members of the plaintiff class, and all Of-Counsel for the plaintiffs.

25. Duty to Defend Decree.

The parties to this Consent Decree shall employ their best efforts to defend this Consent Decree against any challenges to this Consent Decree, in any forum.

Consented to:

/s/ ALEXANDER J. PIRES, JR.

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SO ORDERED

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 4/14/99